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SHDKT PROCEEDINGS AND ORDERS DATE: [10/29/90]

CASE NBR: [89107279] CSY STATUS: [DECIDED]
SHORT TITLE: [Shell, Robert L.]
VERSUS [Mississippi] DATE DOCKETED: [041790]
*** CAPITAL CASE -- No date of execution set *** PAGE: [01]

	DATE	NOTE	PROCEEDINGS & ORDERS
1	Mar 6 1990	G	Application (A89-622) to extend the time to file a petition for a writ of certiorari from March 20, 1990 to May 19, 1990, submitted to Justice White.
2	Mar 7 1990		Application (A89-622) granted by Justice White extending the time to file until April 19, 1990.
3	Apr 17 1990	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
6	May 16 1990		Order extending time to file response to petition until June 18, 1990.
7	Jun 20 1990		Order further extending time to file response to petition until June 28, 1990.
8	Jun 28 1990		Order further extending time to file response to petition until July 3, 1990.
9	Jul 3 1990		Brief of respondent Mississippi in opposition filed.
10	Jul 12 1990		DISTRIBUTED. September 24, 1990

Last page of docket
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	DATE	NOTE	PROCEEDINGS & ORDERS
11	Aug 10 1990	X	Reply brief of petitioner Robert Shell filed.
16	Sep 28 1990		REDISTRIBUTED. October 5, 1990
18	Oct 9 1990		REDISTRIBUTED. October 12, 1990
20	Oct 15 1990		REDISTRIBUTED. October 26, 1990
22	Oct 29 1990		Petition GRANTED. Judgment REVERSED and case REMANDED Opinion per curiam.

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EDITOR'S NOTE

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ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES (2)

October Term, 1989

89-7279

No. ____

ROBERT LEE SHELL,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

KENNETH J. ROSE
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Counsel for Petitioner

QUESTIONS PRESENTED

The following questions are presented to this Court for review:

I. WHETHER THERE IS ANY CONSTITUTIONAL LIMITATION ON THE INTRODUCTION OF GRUESOME, INFLAMMATORY PHOTOGRAPHS WHICH PURPORT TO SHOW THE VICTIM, WHEN THE JURY IS NOT TOLD THAT THERE HAS BEEN MUTILATION BY THE PATHOLOGIST DURING AUTOPSY?

II. WHETHER THIS CASE SHOULD BE REMANDED IN LIGHT OF McKOY v. NORTH CAROLINA?

III. WHETHER THIS CASE SHOULD BE REMANDED IN LIGHT OF CLEMONS v. MISSISSIPPI?

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October Term, 1989

No. ____

ROBERT LEE SHELL,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

The Petitioner, ROBERT LEE SHELL, prays for a writ of certiorari to review the judgment of the Supreme Court of Mississippi affirming Petitioner's sentence to death by lethal gas.

OPINION BELOW

The opinion of the Supreme Court of Mississippi is reported at Shell v. State, 554 So. 2d 887 (Miss. 1989), and is reprinted in full in Appendix A, infra.

JURISDICTION

The judgment of the Supreme Court of Mississippi was entered on November 29, 1989. A timely petition for rehearing was denied on December 20, 1989. Justice White allowed an extension of thirty (30) days in which to file this petition, up to and including Wednesday, April 21, 1990. The jurisdiction of the Supreme Court is therefore timely invoked under *28 U.S.C. § 1257* on the ground that a right or privilege of the defendant is claimed under the Constitution of the United States which right has been denied by the State of Mississippi.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides, in pertinent part, that --

> No person shall . . . be deprived of life . . . without due process of law . . . .

The Sixth Amendment to the United States Constitution provides, in pertinent part, that --

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

The Eighth Amendment to the United States Constitucn provides, in pertinent part, that --

> Excess bail shall not be required . . . nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, that --

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person to life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner was convicted of murder and sentenced to die in Winston County, Mississippi. At the guilt phase of his trial, the prosecution offered five gruesome, color photographs of the victim. In a hearing outside the presence of the jury, the trial judge excluded them pursuant to *Miss. R. Ev. § 403*, finding that their prejudicial impact substantially outweighed any putative probative value.

At the penalty phase, the prosecution offered the photographs into evidence over defense objection. No witness was called to identify the pictures. No mention was made to the jury that one of the pictures was taken in the middle of the autopsy, and revealed not just wounds inflicted in the course of the crime, but also mutilation incidental to the autopsy procedures. The pictures were admitted, and the prosecution argued that they should serve as a basis for the death penalty.

Prior to retiring to deliberate, the jury was lead to believe that they should consider evidence adduced in mitigation only if

it had been found unanimously to exist, and not if each juror individually made the finding. Furthermore, the jury was instructed to consider the oft-condemned circumstance of "especially heinous, atrocious or cruel." *See Miss. Code Ann. § 99-19-101 (5) (h).*

REASONS FOR GRANTING THE WRIT

Petitioner respectfully suggests that the Writ should issue to consider the following important constitutional questions:

I. WHETHER THERE IS ANY CONSTITUTIONAL LIMITATION ON THE INTRODUCTION OF GRUESOME, INFLAMMATORY PHOTOGRAPHS WHICH PURPORT TO SHOW THE VICTIM, WHEN THE JURY IS NOT TOLD THAT THERE HAS BEEN MUTILATION BY THE PATHOLOGIST DURING AUTOPSY?

Two terms ago this Court decided Thompson v. Oklahoma, 487 U.S. ___, 108 S. Ct. ___, 101 L. Ed. 2d 702 (1988). One issue presented in that case -- but never resolved by the Court -- was "whether the Constitution was violated by permitting the jury to consider in the sentencing stage the color photographs of [the victim's] body." Id. at 747-48 (dissenting opinion).

The issue squarely presented in Petitioner's case is much stronger than the alleged constitutional violation which remained unresolved in Thompson. In Thompson, two photographs were considered by the jury at both phases of the trial after being introduced at the guilt phase. Nothing in the Thompson opinions

suggests that the jury was not informed as to the putative relevance of the pictures.[1]

In this case, the only time there was any evidence concerning what the contested photos purported to depict was in a hearing outside the presence of the jury when the pictures were excluded from the guilt phase of the trial. At this point, the trial court found pursuant to *Miss. R. Ev. § 403* that their prejudicial impact substantially outweighed any putative probative value.

The pictures were then submitted to the jury at the penalty phase without any explanatory testimony.[2] Therefore, not only was there no discussion of what the pictures were meant to show, but a reasonable juror would have been led to believe that the mutilation incidental to autopsy was actually the act of the killer.

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1. The Oklahoma court noted that the medical examiner had explained the significance of the photos. See Thompson v. State, 724 P.2d 780, 782 (Okla. Crim. 1986), rev'd sub nom. Thompson v. Oklahoma, 487 U.S. ___, 108 S. Ct. ___, 101 L. Ed. 2d 702 (1988).

2. The court below stated that "there was sufficient explanatory evidence of the photographs. . . ." Shell v. State, 554 So. 2d at 903. While there actually was clearly not sufficient testimony at any point, what evidence that was adduced was in a hearing *in limine* before the judge, but not the jury.

(a) There is great conflict in the Courts below as to whether gruesome and inflammatory photographs may be introduced in capital sentencing proceedings and, if so, as to the standards which should guide a trial court.

Most lower courts recognize that an accused, in capital and noncapital cases alike, may under certain circumstances be

> denied a fair trial when the court allowed a gruesome, color photograph of the deceased's massive head wound to go to the jury. * * * In this case, the photograph which was admitted could serve no purpose other than to inflame and prejudice the jury in the grossest manner.

People v. Garlick, 46 Ill. App. 3d 216, 4 Ill. Dec. 746, 360 N.E. 2d 1121, 1126-27 (1977).

There is considerable divergence, however, on what standard should be used to determine whether the admission of gruesome photographs rises to a Fourteenth Amendment Due Process violation, or contravenes the Eighth Amendment. The State of Mississippi stands as one of the states which has never held that gruesome photographs of the victim should have been excluded from a capital sentencing hearing.[3] The general rule in that state, as set forth in Petitioner's case, is that any picture, no matter how horrible,

3. The court below has once held that the admission of photographs of a distinct murder, without a showing of need, required a new sentencing hearing when combined with other errors. See Stringer v. State, 500 So. 2d 928, 934-35 (Miss. 1986). Just once in recent years the Mississippi Supreme Court has held that gruesome photographs of the victim of the crime charged should not have been admitted in a noncapital case. See McNeal v. State, 551 So. 2d 151 (Miss. 1989); see also Coleman v. State, 67 So. 2d 304, 305 (Miss. 1953).

may be introduced so long as "some 'probative value' is present." Shell v. State, 554 So. 2d at 902 (emphasis supplied; citing cases).[4]

Likewise in Alabama "[t]he fact that a photograph is gruesome and ghastly is no reason to exclude it from the evidence [in a capital case], so long as the photograph has some relevancy to the proceedings, even if the photograph may tend to inflame the jury." Bankhead v. State, ___ So. 2d ___, Slip Op. at 28 (Ala. Cr. App. Sept. 29, 1989) (emphasis supplied) (not yet reported).[5] Like the Mississippi rule, Alabama makes no express requirement that the showing of relevance be made to the jury, as long as some possible relevance may be hypothesized.

4. In theory, Mississippi has adopted rules of evidence which are very similar to the Federal Rules. Thus, in general, "[a]ll relevant evidence is admissible. . . ." *Miss. R. Ev. § 402.* The caveat to this rule is the permissive exception that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. . . ." *Miss. R. Ev. § 403 (emphasis supplied).* The lower court did not acknowledge either rule in its opinion below, and these rules have little bearing on the issues presented in this case: First, as a matter of federal constitutional law, whether there must be a showing of relevancy prior to the admission of prejudicial evidence in a capital case, and second, whether "[r]elevant evidence may be rendered inadmissible for constitutional reasons. . . ." *Comment to Miss. R. Ev. § 402.*

5. While Bankhead is not yet reported, various other Alabama decisions are cited by the Court of Appeals for this proposition. See Magwood v. State, 494 So. 2d 124, 141 (Ala. Cr. App. 1985), aff'd 494 So. 2d 154 (Ala. 1986), cert. denied 479 U.S. 995, 107 S. Ct. 599, 93 L. Ed. 2d 599 (1987); Hutto v. State, 465 So. 2d 1211 (Ala. Cr. App. 1984); Jones v. State, 439 So. 2d 776 (Ala. Cr. App. 1983); Godbolt v. State, 429 So. 2d 1131 (Ala. Cr. App. 1982).

In other states at the very least there is a requirement that evidence be adduced before the jury that photographs are relevant in some way. In State v. Beers, 8 Ariz. App. 534, 448 P.2d 104 (1969), the court found the gruesome photographs to be irrelevant:

> No reference except in identification was made to the photographs by any witness which made the photographs relevant to any of the issues in the case. [Only the] prosecutor made reference to the pictures and bruises in his closing argument. . . .

Id. at 108; accord Bunting v. Commonwealth, 208 Va. 309, 157 S.E.2d 204, 208 (1967) (photograph "which has no tendency to prove [relevant facts], but only serves to prejudice an accused . . . excluded on the ground of lack of relevancy").

Other courts require that the pictures be shown to have a relevancy which is not substantially outweighed by the danger of unfair prejudice, adhering to the formula found in the Federal Rules of Evidence. See, e.g., Jones v. State, 738 P. 2d 525 (Okla. Cr. 1987). This is the standard set forth in the Mississippi rules, but not applied by the court in Petitioner's case.

Some jurisdictions impose an "essential evidentiary value" test for the admission of photographs where they are shown to be gruesome. See, e.g., State v. Clawson, 270 S.E.2d 659, 672 (W. Va. 1980); State v. Rowe, 259 S.E.2d 26, 28 (W. Va. 1979); Commonwealth v. Chacko, 391 A.2d 999, 1001 (Pa. 1978) (invoking "essential evidentiary value" test for inflammatory photographs); Commonwealth v. Scaramuzzino, 317 A.2d 225, 226 (Pa. 1974) ("photograph of a wound at the back of the ear with the hair pulled away"

too prejudicial); Commonwealth v. Liddick, 370 A.2d 729, 731 (Pa. 1977).

Finally, there are courts which have *carte blanche* exclusions for certain pictures such as, for example, those taken during or after autopsy procedures. See, e.g., McCullough v. State, 255 Ga. 672, 341 S.E.2d 706 (1986); Brown v. State, 250 Ga. 862, 302 S.E.2d 347 (1983); People v. Coleman, 116 Ill.App.3d 28, 71 Ill.Dec. 819, 451 N.E.2d 973, 977 (1983); Commonwealth v. Richmond, 358 N.E.2d 999, 1001 (Mass. 1976); State v. Childers, 217 Kan. 410, 536 P.2d 1349, 1354 (1975); People v. Burns, 241 P.2d 308, 318 (Cal. App. 1952); cf. Rosa v. State, 412 So.2d 891, 892 (Fla. DCA3 1982) (excluding photograph which "depicted the results of emergency procedures performed after the stabbing") (citing cases).[6]

Petitioner's case presents an extreme example of the kind of issue which can arise in this context: A gruesome autopsy photograph admitted with no showing of relevancy,[7] and which had been

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6. However, the West Virginia Supreme Court overstates its case in arguing that "courts have been almost universal in their condemnation of admitting photographs depicting the victim's body after it has been subject to autopsy procedures." State v. Clawson, 270 S.E.2d 659, 671 (W.Va. 1980) (emphasis supplied; citing cases). Petitioner's case is one of many which allow the use of autopsy photographs. See, e.g., Shell v. State, 554 So. 2d at 902-03; State v. Partee, 199 Neb. 305, 258 N.W. 2d 634, 638 (1977); see generally, Note, *Admission of Gruesome Photographs in Homicide Prosecutions*, 16 CREIGHTON L. REV. 73 (1982).

7. While there was no evidentiary showing of relevancy, the Mississippi Supreme Court baldly asserted that the pictures "gave evidentiary value to the aggravating circumstance of acts of an 'heinous, atrocious, and cruel' nature." Shell v. State, 554 So. 2d at 902. It is difficult to perceive how a color photograph

(continued...)

excluded as unduly prejudicial at the guilt phase. This provides the Court with an opportunity to provide broad guidance to the lower courts in one case.[8]

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7. (...continued)
may be proof of anything when it is not even shown to the jury to be a picture of the victim. Without deciding whether acts of a "heinous" nature must constitutionally be defined by the mental state of the perpetrator, it is clear that some basic showing of relevancy must be made.

8. The federal circuit courts of appeal have also applied divergent standards in reviewing -- on habeas corpus -- a state trial court's admission of gruesome photographs. Petitioner respectfully suggests that while interests of federal/state comity may require that the standard for habeas corpus review be stringent, the same is not true for review of evidence erroneously admitted at trial when this review occurs on direct appeal to the state supreme court. However, the confusion in the lower courts on the habeas standard also requires resolution by this Court. For example, the Fifth Circuit has applied a simple relevancy test (without any elaboration on what evidence was presented to the jury to show relevance) in allowing the admission of photographs so long as they "were relevant to the aggravating circumstances the state was required to prove in its capital case." Evans v. Thigpen, 809 F.2d 239, 242 (5th Cir. 1987). The Ninth Circuit, albeit in a noncapital case, allowed admission of such evidence where it was not "of such a quality as necessarily prevents a fair trial." Kealohapauole v. Shimoda, 800 F.2d 1463, 1465 (9th Cir. 1986) (quoting Lisbena v. California, 314 U.S. 219, 236, 62 S. Ct. 280, 290, 86 L. Ed. 166 (1941)). The Eighth Circuit held that the "admission of photos is error only if [they are] not even 'arguably relevant and probative' and will necessitate reversal only if so prejudicial as to amount to denial of due process or another specified constitutional right." Perry v. Lockhart, 871 F.2d 1384, 1391 (8th Cir. 1989) (citing Kuntzelman v. Black, 774 F.2d 291, 292 (8th Cir. 1985), cert. denied, 475 U.S. 1088, 106 S. Ct. 1474, 89 L. Ed. 2d 729 (1986)). The Eleventh Circuit has held that a claim will not be cognizable on habeas corpus unless the admission of the photographs was "'a crucial, critical, highly significant factor' in the case against [Petitioner] so as to have denied him a fundamentally fair trial." Williams v. Kemp, 846 F.2d 1276, 1282 (11th Cir. 1988) (quoting Osborne v. Wainwright, 720 F.2d 1237, 1238-39 (11th Cir. 1983)).

(b) The Due Process Clause and the Eighth Amendment both require the exclusion of evidence which may mislead the jury and result in an "unreliable" sentence of death.

In any capital prosecution, the Due Process Clause and the Eighth Amendment set exacting standards by which the fairness of the proceeding must be judged. "The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special '"need for reliability in the determination that death is the appropriate punishment"' in any capital case." Johnson v. Mississippi, 486 U.S. ___, 108 S. Ct. 1981, 100 L. Ed. 2d 575, 584 (1988) (quoting, Gardner v. Florida, 430 U.S. 349, 363-64, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977) (quoting, Woodson v. North Carolina, 428 U.S. 280, 305, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976) (White, J., concurring))).

As any practicing lawyer knows, the issue of "gruesome photographs" is of immense significance in the life-and-death balance of a capital case. The average juror will only be exposed to horrible pictures of a dead body once in a lifetime. "It is unrealistic to believe, even after a limited view, that the horror engendered by these slides could ever be erased from the minds of the jurors. . . ." Commonwealth v. Garrison, 331 A.2d 186, 188 (Pa. 1975).

In this case, it is worth reemphasizing that while the pictures were inherently prejudicial there was no showing that the

evidence was relevant in any way to the decision which the jury was required to make. In seeking to ensure fairness and foster a reliable sentencing determination, this Court has been particularly careful not to ascribe more weight to questionable "evidence" than the Constitution would allow, requiring that the jury be told how the evidence is relevant.[9] This Court has forbidden the introduction of evidence without its probative worth being testing through cross-examination.[10] Indeed, this Court has even forbidden the introduction of evidence which had been shown to be relevant, in order to protect the accused's constitutional rights.[11]

In Petitioner's case, the jury was presented with horrible pictures, and never told that one depicted the body after it had been further mutilated during autopsy procedures. Under the facts of this case, then, the jury relied on evidence which was not shown to be "[]relevant to the sentencing process." Zant v. Stephens, 462 U.S. 862, 885, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983). It is hardly novel to propose that "even in a noncapital sentencing prcceeding, the sentence must be set aside if the [sentencer] relied at least in part on 'misinformation of constitutional magnitude'. . . ." Id. at 887 n.23 (citing Townsend v. Burke, 334 U.S. 736, 740-41, 68 S. Ct. 1252, 92 L. Ed. 1690 (1948)). This Court should grant certiorari to explhasize this principle once again for the lower courts.

9. For example, in Johnson v. Mississippi the State argued that the invalidity of the conviction adduced at trial might be obviated by evidence of the underlying offense. This Court held that such a hypothetical argument was "of no significance here because the jury was not presented with any evidence describing [it]. . . ." Johnson v. Mississippi, 100 L. Ed. 2d at 585. This is obviously analogous to presenting a gruesome photograph to the jury without explaining that it was taken in the middle of autopsy procedures.

10. See, e.g., Gardner v. Florida, 430 U.S. 349, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977) (reliance on confidential presentence report violates Eighth and Fourteenth amendments).

11. See, e.g., Estelle v. Smith, 451 U.S. 454, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981) (evidence taken in violation of the Fifth and Sixth Amendments); Satterwhite v. Texas, 486 U.S. ___, 108 S.Ct. 1792, 100 L.Ed.2d 284 (1988).

II. WHETHER THIS CASE SHOULD BE REMANDED IN LIGHT OF McKOY v. NORTH CAROLINA?

In the instructions given to the members of the jury, they were constantly informed that their findings should be made "unanimously" with respect to aggravating circumstances, but they were never informed that mitigating circumstances should be considered individually. Neither was the jury informed that the failure to agree on a verdict would result in a life sentence, although the instructions told them that a verdict of life or death would have to be made unanimously.

In disposing of this issue, the State court did not even acknowledge this Court's decision in Mills v. Maryland, 486 U.S. ___, 108 S. Ct. 1860, 100 L. Ed. 2d 384 (1988). Rather, relying on Stringer v. Jackson, 862 F.2d 1108 (5th Cir. 1988),[12] the Mis-

12. This case was vacated and remanded to the Fifth Circuit by this Court in light of Clemons v. Mississippi, No. 88-6873, 46 Cr. L. Rptr. 2210 (Mar. 28, 1990), on April 16, 1990. See Stringer v. Black, ___ U.S. ___, No. 88-7000 (April 16, 1990). Petitioner's application for certiorari from his direct appeal is in (continued...)

sissippi Supreme Court rejected Petitioner's claim that the instructions violated the constitution.

The lower court's decision was not predicated on a reasoned determination that no juror might reasonably have misconstrued the instructions. Rather, the court decided that a the jurors would not necessarily have felt "compelled to ignore mitigating circumstances," relying on the defense lawyer's argument to the jury that they should exercise mercy. Shell v. State, 554 So. 2d at 905.

The recent decision in McKoy v. North Carolina, No. 88-5909, 46 Cr. L. Rptr. 2182 (Mar. 5, 1990), reinforces the application of Mills to this case, casts Stringer into great doubt, and makes abundantly clear that the mere fact that defense counsel makes a certain argument will not save an otherwise inadequate charge. See also Hitchcock v. Dugger, 481 U.S. 393, 398, 107 S. Ct. 1821, 95 L. Ed. 2d 347 (1987) (noting that the charge was inadequate "despite the argument of petitioner's counsel"). This Court should therefore remand Petitioner's case to the Mississippi Supreme Court for further consideration in light of McKoy.

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12. (...continued)
a very different procedural context to Stringer, which arises out of federal habeas corpus litigation, but any difference favors Petitioner.

III. WHETHER THIS CASE SHOULD BE REMANDED IN LIGHT OF CLEMONS v. MISSISSIPPI?

Likewise, this Court recently provided guidance on the application of Maynard v. Cartwright, 486 U.S. ___, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), and Godfrey v. Georgia, 446 U.S. 420, 100 S. Ct. 1759, 100 L. Ed. 2d 398 (1980), to the Mississippi scheme. See Clemons v. Mississippi, No. 88-6873, 46 Cr. L. Rptr. 2210 (Mar. 28, 1990).

While an instruction was given in this case which purported to "limit" the application of the invalid aggravating circumstance,[13] Petitioner's case is nevertheless controlled by Clemons. Indeed, in Petitioner's case the Mississippi Supreme Court explicitly relied on Clemons in holding that the court had "placed a limiting construction on 'especially heinous, atrocious or cruel.'" Shell v. State, 554 So. 2d at 906 (quoting Clemons v. State, 535 So. 2d at 1363)). In contrast, this Court explicitly rejected the notion that the Mississippi Supreme Court had placed a limitation sufficient to pass constitutional muster.[14]

In ultimately denying relief on this issue, the lower court relied on Clemons again, holding that "[e]ven should this Court

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13. See *Miss. Code Ann. § 99-19-101(5)(h) (Supp. 1989)* (providing that "[a]ggravating circumstances shall be limited to . . . (h) The capital offense was especially heinous, atrocious or cruel").

14. Petitioner raised an additional claim below, not explicitly addressed by any court in Clemons, concerning the duplicity of the charge. See Shell v. State, 554 So. 2d at 906.

find that the aggravating circumstance challenged here is invalid, the remaining circumstance is sufficient to uphold the death sentence." Shell v. State, 554 So. 2d at 906 (citing Clemons v. State, 535 So. 2d at 1362). It is the rubber-stamping of the constitutional error which this Court has now defined as unacceptable. The Mississippi Supreme Court should be allowed to reconsider its opinion in light of Clemons v. Mississippi.

CONCLUSION

WHEREFORE, Petitioner respectfully requests that this Court grant his Petition for a Writ of Certiorari to review the decision of the Supreme Court of Mississippi.

Respectfully submitted,

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Counsel for Petitioner,
Robert L. Shell

EXHIBIT A

Robert Lee SHELL
v.
STATE of Mississippi.
No. 03-DP-0087.

Supreme Court of Mississippi.
Nov. 29, 1989.
Rehearing Denied Dec. 20, 1989.

Defendant was convicted by jury in the Circuit Court, Winston County, James C. Sumner, J., of capital murder while in act of committing armed robbery, and he appealed. The Supreme Court, Prather, J., held that: (1) statements of defendant's wife to sheriff were not subject to spousal privilege; (2) prosecution's comments during closing argument were not improper; and (3) jury instructions during penalty phase were adequate, and sentence of death was not disproportionate.

Affirmed.

1. Jury ⇐33(2)

Murder defendant was not denied fair trial by "statistical aberration" in venire, nine of the 42 members of which had relatives who had been murdered; seven of those nine venire members did not serve on jury at all, and defendant could have used his remaining peremptory challenges to remove the other two. U.S.C.A. Const. Amend. 6.

2. Jury ⇐110(14)

Trial court's failure to strike jurors for cause did not deprive defendant of his right to fair and impartial jury; no member of jury that convicted defendant had prior knowledge of victim or her family, each juror stated unequivocally that they could be impartial, and defendant did not use his full allotment of peremptory challenges. U.S.C.A. Const.Amend. 6.

3. Witnesses ⇐52(7)

Introduction of statements made by defendant's wife to sheriff did not violate spousal privilege; three of four alleged violations occurred at pretrial hearing, where primary issue was voluntariness of statements rather than defendant's guilt, and defendant encouraged sheriff to question his wife in effort to corroborate his story, so statements were not intended to be confidential. Rules of Evid., Rule 504.

4. Arrest ⇐71.1(6)

Warrantless seizure of defendant's tennis shoes was lawful, as police had probable cause to make warrantless arrest of defendant for murder and could seize defendant's personal effects and clothing following lawful arrest. Const. § 23; U.S.C.A. Const.Amend. 4; Uniform Circuit Court Criminal Rule 1.02(3).

5. Criminal Law ⇐721(3)

Prosecutor's question on cross-examination, as to whether defendant's direct testimony was the first time he had told that particular version of events to any official, was not improper comment on defendant's right to remain silent and to consult with attorney. U.S.C.A. Const.Amend. 5.

6. Criminal Law ⇐419(3)

Minister's testimony regarding telephone call with murder victim's stepdaughter in which she stated "someone has tried to kill me," offered in murder prosecution to explain circumstances surrounding minister's call to authorities and his presence at victim's home, was not hearsay. Rules of Evid., Rule 801.

7. Criminal Law ⇐723(1)

Prosecutor's references to Bible during closing argument were not improper.

8. Criminal Law ⇐720(5)

Prosecutor's comments during closing argument, referring to defendant as a liar, were not improper; defendant himself admitted on stand that he had lied on more than one occasion about key facts, and prosecutor's comments were in response to evidence and testimony presented in case.

9. Criminal Law ⇐723(1)

Prosecutor's comment during closing argument that, unlike his victim, defendant had "jury of 12 good people to decide his fate," was not impermissible comment on

exercise of defendant's specific constitutional rights.

10. Homicide ⇐253(6)

Conviction of capital murder while engaged in commission of robbery was supported by evidence that house of victim whom defendant brutally assaulted with tire iron, though normally kept in tidy condition, was in disarray and by defendant's confession to taking money from victim's purse. Code 1972, §§ 97-3-19(2)(e), 97-3-79.

11. Homicide ⇐358(1)

Testimony during sentencing phase of capital murder prosecution addressing victim's housekeeping habits was not victim impact testimony.

12. Homicide ⇐358(1)

Gruesome photographs of murder victim's body were admissible at penalty phase of capital murder trial, even though they had been ruled inadmissible at guilt phase; photographs provided graphic proof of atrocious nature and extent of victim's injuries, which gave evidentiary value to aggravating circumstance of acts of heinous, atrocious, and cruel nature.

13. Homicide ⇐311

Instruction during penalty phase of capital murder prosecution that jury "may objectively consider the detailed circumstances of the offense for which the defendant was convicted, and the character and record of the defendant" was not defective, where jury was told at later point in instruction that if they found aggravating circumstances to be present then they "must consider" whether mitigating circumstances were also present.

14. Homicide ⇐311

Instruction during penalty phase of capital murder prosecution concerning "heinous, atrocious, or cruel" aggravating factor, defining "heinous" to mean extremely wicked or shockingly evil, "atrocious" to mean outrageously wicked and vile, and "cruel" to mean designed to inflict high degree of pain with indifference to or even enjoyment of suffering of others, adequately defined those terms.

15. Homicide ⇐357(7)

Sentence of death was not disproportionate to crime of murder during course of robbery where victim, a 68-year-old widow, was brutally attacked and defendant, although having some history of alcohol and substance abuse, was not shown to have any mental disorder. Code 1972, §§ 97-3-19(2)(e), 99-19-105(3)c.

Hugh Hathorn, Louisville, Clive A. Stafford Smith, Atlanta, Ga., for appellant.

Mike C. Moore, Atty. Gen., Marvin L. White, Jr., Asst. Atty. Gen., Charlene Robb Pierce, Sp. Asst. Atty. Gen., Jackson, Edwin A. Snyder, Dist. Atty., Eupora, for appellee.

En Banc.

PRATHER, Justice, for the Court:

The appellant, Robert Lee Shell was convicted in the Circuit Court of Winston County for the capital murder of Mrs. Audie Johnson, while in the act of committing armed robbery. Miss.Code Ann. § 97-3-19(2)(e) (Supp.1989). The jury found that Shell should receive the death penalty, from which sentence he appeals.

STATEMENT OF THE FACTS

During the early morning hours of June 8, 1986, Mrs. Audie Kirkland Johnson, a sixty-eight (68) year old resident of Winston County, was at her home with her step-daughter, Mrs. Evelyn Lenaz. Following the death of her husband approximately two weeks earlier, Mrs. Johnson had family members staying with her. On this early Sunday morning, Mrs. Johnson was brutally attacked and murdered by an unknown assailant, and Mrs. Lenaz was permanently injured.

The assailant struck Mrs. Johnson numerous times across the head with a tire iron, causing massive injuries to her head, comminuted fractures, extensive bruises, subdural hemorrhaging, and heavy bleeding, which caused her death. She suffered a cut above her right eye, and on her right index finger, she received a cut so severe that a portion of the finger was almost severed from the hand.

Cite as 554 So.2d 887 (Miss. 1989)

At approximately 3 p.m. on Monday, June 9, Rev. Burlon Commer, the pastor of the church the Johnsons attended, received a call from Mrs. Lenaz at his home. She told him that she had been attacked. Rev. Commer called the Winston County Sheriff's Office and met a deputy sheriff at the Johnson residence. When the two men went inside the house, they found Mrs. Lenaz in a barely conscious state and also found Mrs. Johnson's body. According to witnesses at trial, Mrs. Johnson was a neat housekeeper, but when Rev. Commer and the deputy sheriff entered the house, they discovered that it was in a state of disarray. Papers were scattered about the house, and in the bedrooms, dresser drawers were emptied. Mrs. Lenaz, survived the encounter, although she was hospitalized for two weeks and remembered none of the events surrounding her attack.

Sheriff Billy Rosamond questioned Robert Lee Shell on June 10, two days after Mrs. Johnson's murder while the Sheriff's department was talking to all the people who lived near the Johnson residence. (Shell lived approximately one mile from Mrs. Johnson). Rosamond stated that Shell initially told him that he and his wife had been to a party that Saturday night and had not seen or noticed anything unusual.

Prior to June 21st, the sheriff talked to Joe Hickman, Robert Shell's father-in-law, at Hickman's house trailer. Shell's house trailer was located behind Hickman's trailer. The sheriff learned from Hickman that, although Shell and his wife had been at a family party on the Saturday night preceding Mrs. Johnson's death, Shell left the party early, and his wife was brought home by another family member. Hickman stated that Shell was not at his home that Saturday night and early Sunday morning until between six and seven a.m. Shell told Hickman that he had run out of gasoline and left his car at a store just north of the Johnson home. Robert Shell and his wife took gasoline to Shell's car and removed it. This information caused the sheriff to ask Hickman to have Shell come to his office.

The Sheriff spoke with Shell again on June 21st, when he voluntarily came in, at which time Shell told him the same story concerning his whereabouts on the evening in question. Then Shell told the sheriff to ask his wife if he didn't believe his story. The sheriff then talked to Shell's wife separately, but Shell's story was not corroborated by his wife; rather, she corroborated her father's story. Rosamond asked Shell and his wife if they would object to a search of their trailer for clothing, to which search they agreed. The Shells signed a waiver form, allowing the Sheriff's department to search the trailer.

While at the trailer, Shell's wife, in the presence of Sheriff Rosamond and Officer Curtis Austin, told her husband to "tell ... the truth" because she had already "told ... the truth." The Sheriff then took Shell back to the Sheriff's office, where Shell was read his constitutional rights under the *Miranda* decision, (*Miranda v. Arizona*, 384 U.S. 436, 467-473, 86 S.Ct. 1602, 1624-1627, 16 L.Ed.2d 694, 10 A.L.R.3d 974 (1966)) and signed the waiver of rights form. Following the signing of the form, Shell initially told the same story he had told before. When the Sheriff reminded him what his wife had said to him at the trailer, Shell admitted that he had been out driving the early morning of June 8, and had stopped to pick up two friends, Jimmy Rush and Bubba Hughes. According to this version of Shell's story, Rush and Hughes decided to break into Mrs. Johnson's house. When Shell entered the house, he saw Hughes beating a woman with the tire tool he had used to break into the home. Shell said that he told Hughes to quit beating the woman, and the three men proceeded to ransack the house, eventually netting $257.00 in cash. The men split the money three ways; Shell took the tire tool and threw it behind the house, and went home. The time was approximately 4:30 a.m. on Sunday, June 8, 1989.

Following the giving of this second statement, Shell was officially placed under arrest, and Sheriff Rosamond called Deputy

Greg Lee in to assist him. Lee read Shell his rights once again, and asked him if he would be willing to give a statement that would be put in writing. Shell agreed, and Lee took down a statement that was consistent with Shell's prior oral statement to Sheriff Rosamond. Shell told the Sheriff where he had thrown the tire tool, but because it was too dark, they did not look for it that day. Based on Shell's statement implicating Rush and Hughes, warrants were issued for their arrest. When the two men were found, Hughes and Rush were taken to separate jails to keep the men apart until the Sheriff could talk to each of them individually. Rosamond testified at trial that the only evidence linking Rush and Hughes to the crime was Shell's statement.

The next day, June 22nd, Shell accompanied Rosamond and Lee to the Johnson residence to show them where he had thrown the tire tool. Once Shell showed the two men where he thought the tool was, the tool was found. Shell was returned to the Sheriff's office and was read his *Miranda* rights again prior to questioning by Rosamond and Lee. In this third statement, Shell did not mention Bubba Hughes as an accomplice, and further stated that he wore gloves while inside the Johnson residence and mentioned a pocket knife he had thrown away beside the railroad track. Shell showed the officers where the gloves were located, but the knife was not found until later.

Sheriff Rosamond testified that on the morning of June 23, when he arrived at work, he was told that Shell wanted to see him. When Rosamond talked to Shell, Shell told him that Jimmy Rush was not involved in the attack on Mrs. Johnson or Mrs. Lenaz. The Sheriff called Deputy Greg Lee into his office again, and Shell was read his rights. In the fourth statement Shell gave, he admitted that he had acted alone when he broke into Mrs. Johnson's home, killing her and injuring Mrs. Lenaz. A psychiatric examination was given the defendant which showed that the defendant was criminally responsible at the time of the crimes and was competent to stand trial although he had a history of alcohol and substance abuse.

At trial Sheriff Rosamond testified that Shell was asked to give the sheriff's office the tennis shoes he was wearing, and that he did so voluntarily. Bloodstains were found in several rooms of the house, and traces of blood were found on the tire tool, the gloves, and on the tennis shoes belonging to Robert Lee Shell. No blood was found on a pair of tennis shoes belonging to Jimmy Rush.

Frank McCann, a forensic scientist with the Mississippi Crime Laboratory, testified that the marks found on a piece of paper from inside the Johnson residence were made by the right shoe of Robert Lee Shell. Furthermore, the marks on a business card also found inside the home were made by a right shoe pattern similar to or consistent with, the shoe worn by Shell. McCann also testified that the tests he had run were 100% accurate.

Shell testified at trial, relating a fifth version of the crime. He stated that he had been riding around with Jimmy Rush the night in question. He testified that Bubba Hughes was not with them, but a man named Dexter Ball was. According to Shell's testimony at trial, he, Rush and Ball rode in Shell's car to Noxapater. Rush was at the wheel because Shell was too intoxicated to drive. The group travelled to a party at an unspecified location and then returned to Winston County. According to Shell, his car ran out of gas on the way home, forcing him to leave his car at Flowers' Store.

Continuing Shell's in-court testimony, he stated that as he was walking down the road, he saw three men running from a trailer near the Johnson residence. When the men saw Shell, they yelled at him and began chasing him. Shell was able to outrun the men and hide in the woods. When Shell reached his trailer, he climbed in the bathroom window and went to bed. Shell further testified that when he went to pick up his car the next day, he discovered a gun holster, Army belt, and a pocket knife on the back seat. He also testified that he received two phone calls warning him that

he should "take the blame" for what had happened on the night of June 8, "or else they would get to my wife and me." When shown the tennis shoes that the Sheriff's office claimed to have taken from him, Shell stated they were not his shoes.

When questioned about the approximate $300.00 he showed his aunt and uncle the day after Mrs. Johnson's murder, Shell claimed he had won the money gambling the night before. Shell was the only witness put on by the defense. During rebuttal testimony by the State, Greg Lee discredited Shell's testimony. He testified that he had measured the two windows on the back side of Shell's trailer and that they were 55–60 inches from the ground and measured only 12 inches in width. Shell testified on cross-examination that he weighed 170 pounds in June of 1986.

Following the presentation of all evidence by both sides, the jury found Shell guilty of capital murder. Under a separate sentencing hearing in accordance with Miss.Code Ann. § 99–19–101(7) (Supp.1989) the jury found that the defendant Shell, intended to kill, attempted to kill, and actually killed Audie Kirkland Johnson, and contemplated that lethal force would be used. Additionally, under Miss.Code Ann. § 99–19–101(2) (Supp.1989), the sentencing jury found as aggravating circumstances that the capital murder was (1) committed when engaged in the commission of robbery and (2) was especially heinous, atrocious, and cruel. Further, the sentencing jury found that "there are insufficient mitigating circumstances to outweigh the aggravating ..." circumstances and imposed the sentence of death. Following sentencing, the case was appealed to this Court.

THE GUILT/INNOCENCE PHASE

I.

DID THE "STATISTICAL ABERRATION" WHICH RESULTED IN NINE MEMBERS OF THE VENIRE WHO HAD HAD A CLOSE RELATIVE MURDERED REQUIRE AMELIORATIVE ACTION BY THE TRIAL COURT?

[1] Under Shell's first assigned error, he claims a "statistical aberration" [1] in the venire from which the jury was drawn prevented him from receiving a fair trial. *Mhoon* is factually distinguishable from the case at bar, and as a consequence, there is no merit to this assignment of error.

Of the forty-two (42) members of the regular and special venire panels, nine (9) of them had relatives who had been murdered. These relatives included brothers, brothers-in-law, first cousins, fathers-in-law, grandparents and uncles. The State argues on appeal that Shell is barred from assigning this as error because defense counsel failed to object to the composition of the venire and/or jury at trial. *Cannaday v. State*, 455 So.2d 713, 718–19 (Miss. 1984).[2]

Although not objected to at trial, this assigned error has no merit. Of the nine (9) members of the venire who had had relatives murdered, seven (7) of them did not serve on the jury at all. When voir dire was completed, the defense had two peremptory challenges that had not been used. Therefore, if the defense had objected to the two (2) remaining members of the venire who actually served on the jury *and* had relatives who had been murdered, none of the original nine would have served. The defense had sufficient peremptory challenges remaining to remove the jurors if they so desired. *See Gilliard v. State*, 428 So.2d 576, 580 (Miss.1983); *Rush v. State*, 278 So.2d 456, 458 (Miss.1973).

Shell relies heavily on *Mhoon*, *supra*, to support his claim that the venire, and consequently the jury, were tainted by the presence of nine (9) venirepersons who had relatives that had been murdered. This Court disagrees, because the facts surrounding *Mhoon* are distinguishable from those in this case. In *Mhoon*, twelve (12) of the thirty-nine (39) venirepersons "were either policemen or related by blood or

1. This phrase is borrowed from *Mhoon v. State*, 464 So.2d 77, 81 (Miss.1985).

2. It should be noted that Shell is represented by different counsel on appeal to this Court.

marriage to a current or former police officer ..." *Id.* at 80. Of this number, six (6) served on the jury, and the jury foreman was a policeman in uniform. Finally, defense counsel in *Mhoon* exhausted all of his peremptory challenges during jury selection. *Id.* This Court held that the "statistical aberration", which produced such a venire/jury, mandated a reversal of Mhoon's conviction for a new sentencing hearing. *Id.* at 81–82. The Court was careful to point out, however, that the mere presence of law enforcement officials in a jury pool was not *per se* improper, provided the prospective juror was otherwise qualified and was not peremptorily struck by either party. *Id.* at 81.

In the case *sub judice*, the trial court questioned each member of the venire about their ability to be impartial, and defense counsel asked each member of the venire if those relationships would prevent them from being "fair and impartial" toward the defendant, Robert Shell. Neither juror Sherrod, whose uncle had been killed, nor juror Goss, whose brother had been killed, indicated they would find it difficult to fulfill their obligations in a fair and impartial manner. Neither juror was peremptorily challenged or challenged for cause.

Cases from other jurisdictions, both federal and state, have held that the presence on a jury of a crime victim, or the relative of a crime victim, is not *per se* improper.

> The fact that a juror or his relative has been the victim of some crime, unrelated to the offense being tried, is, we think, only minimally relevant to the question of that juror's impartiality. Indeed, if the mere fact that a juror or his relative had been the victim of some crime unrelated to that being tried constituted grounds for discharge, it would become difficult, if not impossible, to assemble a jury panel.

U.S. v. Jones, 608 F.2d 1004, 1007 (4th Cir.1979), *cert. denied*, 444 U.S. 1086, 100 S.Ct. 1046, 62 L.Ed.2d 773 (1980).

In *Jones, supra*, the Court summarized the issue thusly: "We decline to establish a *per se* rule of disqualification where a juror is related to a victim of a similar crime." *Id.* at 1008. See also, *Williams v. U.S.*, 521 A.2d 663, 665 (D.C.App.1987); *Commonwealth v. Johnson*, 299 Pa.Super. 172, 445 A.2d 509, 514 (Pa.Super.1982).

After reviewing *Mhoon* and case law from various other jurisdictions, this Court concludes that there is no merit to this assignment of error.

II.

DID THE FAILURE TO STRIKE VARIOUS JURORS FOR CAUSE DEPRIVE SHELL OF HIS RIGHT TO A FAIR AND IMPARTIAL JURY?

[2] Under this assignment of error, Shell asserts that the "local knowledge" of the facts of the case made a fair trial impossible. He maintains that too many of the jurors had extensive knowledge of the case and/or built-in biases which created doubt as to their impartiality. After examining both the voir dire of prospective jurors and the actual composition of the jury, this Court concludes there is no merit to this claim.

Once again, the State is correct in noting that no objection was ever made by the defense to the composition of the jury. *Cannaday v. State*, 455 So.2d 713, 718–19 (Miss.1984). It is also noteworthy that Shell had initially requested a change of venue. However, before the trial began, he withdrew the motion for a change of venue on his own accord. Shell had the constitutional right to have his trial held in Winston County where the offense was committed. Miss. Const., Art. 3, Sec. 26; *State v. Caldwell*, 492 So.2d 575 (Miss. 1986).

Shell asserts in his brief that twenty-five (25) of the prospective jurors knew the victim or a member of her family, including her late husband. Shell also maintains that thirteen (13) prospective jurors stated they could not be impartial, for various reasons. The most crucial fact in the case is how many of these alleged "biased" members of the venire became jurors. From this Court's inspection of this record, no member of the jury that convicted Robert Lee Shell had prior knowledge of Mrs. Johnson or her family, and each juror stated unequivocally that they could be impartial. There is no reason to doubt the truth of these responses.

As indicated above, this Court has held on more than one occasion that when a trial court fails to sustain a challenge for cause by the defense, it must be shown that the defense had exhausted all of its peremptory challenges before the trial court's refusal to allow the challenge for cause. *Chisolm v. State*, 529 So.2d 635, 639 (Miss. 1988); *Johnson v. State*, 512 So.2d 1246, 1255 (Miss.1987). Shell failed to use his full allotment of peremptory challenges. When voir dire was completed, he still had two peremptory challenges remaining. For all of these reasons, this Court concludes there is no merit to this assignment of error.

III.

WERE STATEMENTS USED AGAINST SHELL TAKEN IN VIOLATION OF THE SPOUSAL PRIVILEGE?

[3] Shell next contends that on several occasions certain statements allegedly taken in violation of the spousal privilege, were allowed into evidence. Three of these alleged violations of the spousal privilege occurred at the pre-trial hearing and one occurred at trial.

No person has a privilege to refuse to be a witness, or to refuse to disclose any matter or to produce any object or writing, or to prevent another from being a witness, disclosing any matter or producing any object or writing (M.R.E. 501), except for recognized privileges given by the federal or state constitutions or by the rules of evidence. The recognized spousal privilege asserted by Shell here is found in Rule 504, Mississippi Rule of Evidence (M.R.E.), the relevant portions of which read as follows:

> **RULE 504. HUSBAND–WIFE PRIVILEGE**
>
> **(a) Definition.** A communication is confidential if it is made privately by any person to his or her spouse and is not intended for disclosure to any other person.
>
> **(b) General Rule of Privilege.** In any proceeding, civil or criminal, a person has a privilege to prevent his spouse, or former spouse, from testifying as to any confidential communication between himself and his spouse.
>
> **(c) Who May Claim the Privilege.** The privilege may be claimed by either spouse in his or her right or on behalf of the other....

The spousal privilege has ancient roots [3] and prohibited a wife from testifying against her husband based upon the concept that husband and wife were one entity. Since the woman held no separate legal existence in medieval times, the husband was that entity. *Trammel v. United States*, 445 U.S. 40, 44, 100 S.Ct. 906, 909, 63 L.Ed.2d 186 (1980). Although the basis for the privilege has long been abandoned, the spousal privilege has continued in some form and is applied to both spouses. The privilege is under criticism today under the view that the spousal privilege contravenes the public's "right to every man's evidence". *Trammel, supra*, 445 U.S. at 50, 100 S.Ct. at 912.

A. Pretrial Hearing

The first complaint occurred at the pretrial motion to suppress hearing during Sheriff Rosamond's testimony. He testified that Mrs. Shell "... told me the same thing that her daddy did." He then related the essence of Mrs. Shell's story given outside the defendant's presence denying that Shell had been at home with her Saturday night after the party on June 8. No objection was made at this point to the Sheriff's testimony, and the State asserts, once again, that Shell is procedurally barred from challenging this point on appeal. Because the matter was not presented to the jury, at most, it would infect the integrity of the suppression hearing.

In such a setting, it is appropriate to quote from *Cole v. State*, 525 So.2d 365 (Miss.1987).

3. E. Coke, A Commentarie upon Littleton 6b (1628).

Counsel may not sit idly by making no protest as objectionable evidence is admitted, and then raise the issue for the first time on appeal. If no contemporaneous objection is made, the error, if any, is waived. This rule's applicability is not diminished in a capital case. *Irving v. State*, 498 So.2d 305 (Miss.1986), *cert. denied*, [481] U.S. [1042], 107 S.Ct. 1986, 95 L.Ed.2d 826 (1987); *Johnson v. State*, 477 So.2d 196 (Miss.1985), *cert. denied*, 476 U.S. 1109, 106 S.Ct. 1958, 90 L.Ed.2d 366 (1986); *In re Hill*, 460 So.2d 792 (Miss.1984); *Hill v. State*, 432 So.2d 427 (Miss.1983), *cert. denied*, 464 U.S. 977, 104 S.Ct. 414, 78 L.Ed.2d 352 (1983).

Cole v. State, 525 So.2d at 369; *See also, Pinkney v. State*, 538 So.2d 329, 338 (Miss. 1988). *But see, Cole, supra*, 525 So.2d at 384–85 (Robertson, J., concurring).

The next instance of "objectionable" testimony occurred at the pre-trial hearing as well. The Sheriff testified that Shell was not aware of the particulars of his wife's testimony, whereupon Rosamond related her version of the night's events to the appellant. At this point, defense counsel raised an objection to the Sheriff's statements based on spousal privilege. The objection was overruled by the trial court.

Shell's reliance on *Bayse v. State*, 420 So.2d 1050 (Miss.1982), is misplaced. In *Bayse*, a police officer was allowed to "repeat all of the statements made by the defendant's wife to him and outside the defendant's presence." *Id.* at 1053. That case differs from the case *sub judice* in that here, three of the four complained-of statements were made at a pre-trial hearing, where the primary issue was the voluntariness of the statements, not the guilt of the appellant. Additionally, Shell encouraged the Sheriff to question his wife, in an effort to corroborate his story.

The defendant asserts that these three instances that occurred at the pretrial stage constitute reversible error. The error asserted is introduction of statements of Shell's wife made to the Sheriff that were subject to the spousal privilege of M.R.E. 504. Rule 504 applies to the *spouse testifying* as to *confidential* communication *between* the spouses and not intended for disclosure to any other person. Initially, this Court notes that these statements of Shell's wife were made to the Sheriff, outside her husband's presence. They were not confidential statements between spouses, and they were not intended to be confidential because Shell invited the Sheriff to talk to his wife. There is no spousal privilege here. If there were any private communications between the Shells that were repeated to the Sheriff by Mrs. Shell, Shell waived any privilege by inviting the Sheriff to talk to his wife. Such a statement was not made under circumstances that suggest it was intended to be confidential.

Additionally, there is equally applicable here the procedural bar for the defense failure to contemporaneously and timely object. This Court holds that no error was committed here for reason of the spousal privilege assertion, and even if so, any error would be harmless. This is so because the evidence received does not call into question the voluntariness finding of the suppression hearing and because the evidence was not presented to the trial jury.

B. At Trial

The next challenged exchange occurred after searching the trailer, when Sheriff Rosamond asked Shell to come down to the Sheriff's office to talk further. As they were leaving, Sheriff Rosamond testified that Mrs. Shell said, "Robert, you tell Mr. Rosamond the truth. I've already told him the truth." Sheriff Rosamond repeated this statement at both the pre-trial hearing and at trial, but defense counsel only timely challenged the statement's admissibility at trial. This objection was overruled by the trial court.

This claim of spousal privilege must also be analyzed under M.R.E. 504. True, the statement was made between the defendant and his wife, but it was made in the presence of the Sheriff and deputy sheriff and was not under circumstances suggesting confidentiality.

The presence of the Sheriff and his deputy when the statement was made is fatal to this portion of Shell's claim.

The privilege protected by Miss.Code Ann. § 13–1–5 extends only to communications which are intended to be confidential. Thus, *the presence of another person, even a family member, is deemed to mean that the communication was not intended to be confidential.*

Fanning v. State, 497 So.2d 70, 74 (Miss. 1986); *Dycus v. State*, 440 So.2d 246, 256 (Miss.1983). This view has been carried forward in Rule 504. See *Comment*, Rule 504, Mississippi Rules of Evidence;

It is important that this Court note that the Sheriff was asked by the prosecutor "[A]fter you talked to his wife, what happened?" The Sheriff's reply, although unresponsive, was "[s]he told me the same story that he had told me." Record, Vol. III, p. 255. Initially, a reader might wonder to whom the "he" refers. A reading of the trial transcript, however, will reveal that only the defendant's statements were in the record. The content of Shell's now-deceased father-in-law was not mentioned at trial, nor was the content of the spouse's statements.

This Court concludes that there is no error based upon the spousal privilege in this record. The hearsay aspect of this assignment is the subject of an assignment under VI.

IV.

WERE THE SHOES TAKEN FROM SHELL SEIZED IN VIOLATION OF ARTICLE 3, SECTION 23 OF THE MISSISSIPPI CONSTITUTION AND THE FOURTH AMENDMENT OF THE U.S. CONSTITUTION?

[4] Shell claims here that his tennis shoes were taken from him in violation of his constitutional rights under Mississippi Constitution Art. 3, § 23, which provides that "[t]he people shall be secure in their persons, houses, and possessions, from unreasonable seizure or search; and no warrant shall be issued without probable cause, supported by oath or affirmation, specially designating the place to be searched and the person or thing to be seized." U.S. Const. Amend. IV. He advances two theories to support his claim that the shoes were illegally seized: the evidence which supported probable cause for the arrest was illegally obtained; and, even if there was sufficient evidence to establish probable cause, the seizure of the tennis shoes without a warrant was illegal. This Court disagrees.

Before the trial began, defense counsel filed a written motion to suppress various statements made by Shell, allegedly in violation of his constitutional rights. Shell claimed the statements were "obtained in violation of defendant's privilege against self-incrimination and his right to counsel ..." and "... constitute the fruit of an unlawful arrest in violation of defendant's right of privacy ..." At the conclusion of the hearing, the trial court found that the appellant had been given his *Miranda* warnings, that these rights had been voluntarily, knowingly, and intelligently waived each of the four times he was interviewed, that under all the circumstances and applicable law, the arrest was legal and based on probable cause, and that the statements made by the appellant were voluntarily, knowingly, and intelligently made and were therefore admissible.

The trial court's holding was based on the following findings of fact. During the Sheriff's investigation into Mrs. Johnson's death, he found a discrepancy in the appellant's story. The appellant and his wife voluntarily went to the sheriff's office, at the Sheriff's request. Further discussions with the appellant and his wife led to an increase in the discrepancy. The Shells consented to a search of their trailer, after which the appellant voluntarily returned to the Sheriff's office. Although not in custody, Shell was read his *Miranda* rights, and he read and signed a written waiver of those rights. He gave a statement following the waiver of his *Miranda* rights, and as the investigation continued, he was given the *Miranda* warnings on other occasions. On each of those occasions, he waived his rights and gave statements. The trial court further found that the State had produced each person who could have conceivably been present when any threats

were made and also found that no coercion had been used. *Agee v. State*, 185 So.2d 671 (Miss.1966). The trial court also addressed the issue of right to counsel, which was raised in the motion but not argued. The trial court found there were no constitutional violations in that area.

This Court has summed up the requirements for probable cause which would support a warrantless arrest in the following manner:

> [A] police officer must have (1) reasonable cause to believe a felony has been committed; and (2) reasonable cause to believe that the person proposed to be arrested is the one who committed it.

Floyd v. State, 500 So.2d 989, 991 (Miss. 1986). *See also, Lockett v. State*, 517 So.2d 1317, 1327 (Miss.1987); Rule 1.02(3), Miss.Unif.Crim.R.Cir.Ct.Prac.

Along these lines, the Court has also held that:

> The existence of "probable cause" or "reasonable grounds" justifying an arrest without a warrant is determined by factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The determination depends upon the particular evidence and circumstances of the individual case.

Lockett v. State, 517 So.2d 1317, 1327 (Miss.1987) (quoting *Swanier v. State*, 473 So.2d 180, 186 [Miss.1985]).

To be even more specific, law enforcement officials need not believe "beyond a reasonable doubt" that a crime has been committed, they need only have a "reasonable belief ... a belief rising above mere unfounded suspicion." *Alexander v. State*, 503 So.2d 235, 238 (Miss.1987). In this case, the information possessed by the Sheriff's department meets these minimum requirements. Therefore, under the circumstances of this case, there was probable cause for the warrantless arrest.

Under the second half of Shell's argument, he maintains that even if there was sufficient probable cause for the warrantless arrest, "the seizure of his shoes without a warrant was illegal." The basis of Shell's assertion appears to be a lack of "exigent circumstances" which would have justified the warrantless seizure of the tennis shoes. This Court disagrees.

It is a long-standing rule in this, and other jurisdictions that, pursuant to a lawful arrest, law enforcement officials may seize personal effects and clothing from one who has been arrested.

> In the instant case the officers took the personal possessions of the defendant after he was arrested. This search is always necessary for many reasons. Among those are: to discover weapons and means of escape; to prevent means of injury to the prisoner and others; to discover necessary medical requirements; *to discover evidence in connection with the charge for which accused was arrested;* to discover wounds and need for immediate first aid, and to preserve the property of the defendant.

Upshaw v. State, 350 So.2d 1358, 1363–64 (Miss.1977) (quoting *Wright v. State*, 236 So.2d 408, 411–12 [Miss.1970]) (Emphasis added). See also, *Wright v. Edwards*, 343 F.Supp. 792, 798 (N.D.Miss.1972); *U.S. v. Farrar*, 470 F.Supp. 128, 131 (S.D.Miss. 1979).

This point of law has also been addressed by various legal commentators:

> Thus, on incident-to-arrest grounds, it has been held that at the station the police may search through the arrestee's pockets, wallet, other containers on the person, and even underclothing, may require the arrestee to strip, and may seize incriminating objects thereby revealed. It is not necessary that there be advance probable cause that such objects will be found.

2 W. LaFave, *Search and Seizure*, § 5.3(a), at 479–80 (1987). (*See also*, accompanying footnotes and cases cited therein).

LaFave, *supra*, cites several cases from other jurisdictions which have specifically addressed the evidentiary value of the arrestee's clothing. *See State v. Brierly*, 109 Ariz. 310, 509 P.2d 203 (1973) (bloody clothing); *Eberhart v. State*, 257 Ga. 600, 361 S.E.2d 821 (1987) (defendant required to remove clothing on which police then discovered victim's blood); *State v. Freeman*, 297 N.W.2d 363 (Iowa 1980) (bloody shoes and trousers); *State v. Petite*, 286 So.2d 625 (La.1973) (t-shirt, pants, underwear); *Commonwealth v. Gliniewicz*, 398 Mass. 744, 500 N.E 2d 1324 (1986) (boots worn by defendant with tread similar to that of print at crime scene and with blood on them); *State v. Smith*, 295 Minn. 65, 203 N.W.2d 348 (1972) (boots); *Greenfield v. Commonwealth*, 214 Va. 710, 204 S.E.2d 414 (1974) (bloody clothing).

In the case at bar, the seizure of Shell's tennis shoes is clearly within the intended scope of the above-cited principles of law. The shoes were removed at the Sheriff's department's request, pursuant to a valid arrest which was based on probable cause. As a consequence, there is no merit to this assignment of error.

V.

DID THE PROSECUTION IMPROPERLY COMMENT ON SHELL'S FAILURE TO COMMUNICATE HIS TESTIMONY TO LAW ENFORCEMENT OFFICIALS PRIOR TO TRIAL, IN VIOLATION OF *DOYLE V. OHIO*?

[5] On direct examination, Shell testified that on more than one occasion he had tried to tell the Sheriff about seeing three people run out of Mrs. Johnson's house on the evening of June 8. On cross-examination the prosecuting attorney then asked: "Today is the first time you have told any official the version that you've given today?" Shell responded that it was not. He now contends under this assignment of error that the prosecution's question on cross-examination constituted an improper comment on his right to remain silent and to consult with an attorney. He is incorrect in these assertions.

Once again, the State correctly points out in their brief that no objection was made by defense counsel to this question, and therefore, the point is procedurally barred under the authority of *Cole* and *Pinkney*, *supra*. Turning nonetheless to the merits of the claim, Shell's reliance on *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), and *U.S. v. Shavers*, 615 F.2d 266 (5th Cir.1980), is misplaced because each of those cases is distinguishable from this one on a factual basis. *Doyle* addressed an attempt to impeach the defendant with his prior silence and *Shavers* dealt with the issue of whether the "silence" occurred pre- or post-arrest.

In the case at bar, Shell testified to a version of the events of the morning of June 8 that had never before been given to the Sheriff's office, and in so doing Shell opened himself up to impeachment. The record reflects that Shell *did* in fact give the Sheriff four other versions of the story. Once he related this new sequence of events on direct examination, the prosecution was well within its rights on cross-examination to inquire further about the novelty of the story. Shell opened this door on direct examination of his own accord, and he should not be allowed to derive an unfair advantage (in effect, penalizing the prosecution) by having done so. There is no merit to this assignment of error.

VI.

DID THE USE OF HEARSAY AND HEARSAY-UPON-HEARSAY IN SECURING SHELL'S CONVICTION DEPRIVE HIM OF DUE PROCESS?

Shell challenges several statements made at trial, from a variety of sources, as hearsay and hearsay-upon-hearsay. M.R.E. 801. Again, no defense objection was made as to any of the evidence.

The first point under this assignment is a subject that has already been addressed under another assignment of error—namely, the statements made by Mrs. Shell to the Sheriff, allegedly in violation of the spousal privilege. The issue here is with reference to its hearsay nature. However, the record shows that the sheriff stated "She told me the same story that *he* had told me." The record is not clear as to whom "he" refers, whether Mrs. Shell's father or her husband. No contemporaneous objection to hearsay was made. This Court holds that this statement does not constitute reversible error based upon a hearsay objection.

Shell next claims that the Sheriff's testimony concerning his conversations with the appellant's father-in-law constituted hearsay. The appellant makes several references in his brief to the points where the alleged hearsay testimony can be found. The only references by the Sheriff in the record to the appellant's father-in-law concern the location of the father-in-law's residence, the fact that the father-in-law was dead at the time of trial, and the fact that the Sheriff talked to the father-in-law on June 10, 1986, two days after the murder took place. There is no testimony from the Sheriff as to the specifics of his conversation with the father-in-law. Therefore, there is no hearsay present to form a basis-in-fact for this portion of the assignment of error.

[6] Shell next questions the testimony of Rev. Commer, in particular the following statements:

> A. And my wife did talk with Evelyn (the victim's stepdaughter), and she said, "This is Evelyn." And my wife knows several Evelyns, and she asked, "Evelyn who?" She said, "Bro. Johnson's daughter." She said, "Someone has tried to kill me."
> ...
> A. No, I didn't know where she was, and I wasn't even sure if it was Evelyn, because it didn't sound hardly human.

The State once again asserts the procedural bar issue, because no objection to the testimony was ever made by defense counsel. *Cole* and *Pinkney, supra*. Rev. Commer's testimony was offered to prove something other than the truth of the matter asserted. He was asked the questions, not to prove that someone had killed Mrs. Johnson and attempted to kill Evelyn Lenaz, but to explain the circumstances surrounding his call to the authorities and to explain his presence at Mrs. Johnson's home.

Cases from this Court have upheld the introduction into evidence of other alleged hearsay testimony when their admissibility was challenged on appeal. See *Harrison v. State*, 534 So.2d 175, 179 (Miss.1988) (prior statements of witness admissible as circumstantial evidence to show that his trial testimony was unreliable); *Alford v. State*, 508 So.2d 1039, 1042 (Miss.1987) (father-in-law's testimony offered not to show that defendant had gun but to show why father-in-law went to get gun); *Swindle v. State*, 502 So.2d 652, 657–58 (Miss.1987) (conversation of informant admissible to show why officer acted as he did and was in particular location at a particular time); *Graves v. State*, 492 So.2d 562, 565 (Miss. 1986) (statement offered not to prove defendant was wearing certain clothing, but that a witness said he was).

Shell's final challenge under this assignment of error concerns the admission into evidence of a copy of Mrs. Johnson's death certificate. He maintains that the introduction of the death certificate without producing witnesses who could be cross-examined about it, constituted hearsay. There is a specific exception to the hearsay rule, under Rule 803 of the Mississippi Rules of Evidence, which addresses this situation:

> **(9) Records of Vital Statistics.**
> Records or data compilations of vital statistics, in any form, if the report thereof was made to a public officer pursuant to requirements of law.

A death certificate clearly falls under the language of this hearsay exception. No contention is made that the death certificate was not properly certified or was otherwise defective. There is no merit to this assignment of error.

VII.

DID THE CLOSING ARGUMENTS BY THE PROSECUTION INJECT ARBITRARY ISSUES INTO THE JURY'S DELIBERATION AND THEREBY DEPRIVE SHELL OF A FAIR TRIAL?

Shell maintains that the closing argument presented by the prosecution were improper for three (3) reasons: (1) references to the Bible (2) statements that the appellant lied, and (3) a statement that Robert Shell possessed constitutional rights. This Court is of the opinion that there is no merit to these contentions.

As a preliminary matter, the State once again cites *Cole* and *Pinkney, supra*, because no contemporaneous objection was made to any portion of the prosecution's closing argument. Additionally, they cite *Johnson v. State*, 477 So.2d 196 (Miss. 1985), a capital murder case which addressed the necessity for contemporaneous objections to objectionable closing arguments.

> We next observe it is the duty of a trial counsel, if he deems opposing counsel overstepping the wide range of authorized argument, to promptly make objections and insist upon a ruling by the trial court. The trial judge first determines if the objection should be sustained or overruled. If the argument is improper, and the objection is sustained, it is the further duty of trial counsel to move for a mistrial. The circuit judge is in the best position to weigh the consequences of the objectionable argument, and unless serious and irreparable damage has been done, admonish the jury then and there to disregard the improper comment....

477 So.2d at 209–10 (citations omitted).

[7] During closing argument in the case *sub judice*, the prosecution made the following statement:

> In Genesis, there is a story that we are told about a question asked by God of Cain when [H]e asked him, "Where is your brother?" And Cain archly replied to God, "What? Am I my brother's keeper?" That is the first recorded instance in the whole of the human race where a murder was committed. And as human beings we are today in this Courtroom poor because of the sin of Cain against his brother whose life he took.
> We live an age in which human life by many is cheap indeed. And we still hear ringing in our voices the question of God, "Where is your brother?"

In the first instance, while pointing out religious references made by the prosecutor, Shell neglects to mention the numerous references to the Bible made by his own trial counsel. Examples of these religious references are scattered throughout defense counsel's closing argument.

In the second place, such "religious" references are not improper.

> Counsel may draw upon literature, history, science, *religion*, and philosophy for material for his argument. He may navigate all rivers of modern literature or sail the seas of ancient learning; he may explore all the shores of thought and experience; he may, if he will, take the wings of the morning and fly not only to the uttermost parts of the sea but to the uttermost limits of space in search of illustrations, similes, and metaphors to adorn his argument.

Johnson v. State, 416 So.2d 383, 391 (Miss. 1982) (*quoting Gray v. State*, 351 So.2d 1342, 1346 [Miss.1977]) (emphasis added). *See also, Wilcher v. State*, 448 So.2d 927, 942 (Miss.1984).

[8] Shell next contends that the prosecution improperly called him a liar during closing arguments. There are several references by the prosecution in which they characterize Shell as a liar. However, case law in this State runs directly contra to Shell's position. In *Simpson v. State*, 497 So.2d 424 (Miss.1986), the prosecutor made multiple references to the defendant as a liar. *Id.* at 431. In upholding the appellant's conviction, this Court held the following:

> In this case, the comment by the prosecutor was that the defendant was not telling the truth about the events of March 4, 1982. That can hardly be said to be an extraneous issue, since, if the State believed Simpson's story, he would not have been tried. There is no error here.

497 So.2d at 432.

The vast majority of the prosecutor's statements labeling Shell a liar occurred as he was reiterating key portions of the story Shell told on the stand concerning the events of the evening of June 8. Shell had never told that particular version of the night's events prior to trial. Additionally, he had already given three other versions of the story to the Sheriff's department in written statements. Under the circumstances, it is understandable that the prosecutor would feel justified in calling Shell a liar.

Shell himself admitted on the stand that he had lied on more than one occasion about key facts. The prosecutor's comments were in response to evidence and testimony presented in the case, and he was allowed to draw reasonable conclusions from them.

> He may comment upon any facts introduced in evidence. He may draw whatever deductions seem to him proper from these facts, so long as he does not use violent and abusive language, and even in many cases invectives may be justified and even called for, as pointed out by Chief Justice Whitfield in *Gray v. State*, 90 Miss. 235, 43 So. 289.

Johnson v. State, 416 So.2d 383, 391 (Miss. 1982) (*quoting Nelms & Blum Co. v. Fink*, 159 Miss. 372, 131 So. 817 [1930]).

[9] Finally, Shell challenges the prosecution's comment that he was "clothed in the full protection of the Constitution of the United States and he has got what Audie Johnson never got. And that is a jury of twelve good people to decide his fate." Shell claims that this statement represented a comment on his exercise of specific constitutional rights. This Court has expressed its disapproval of such a practice. *Griffin v. State*, DP-68, — So.2d —, — (decided August 10, 1989) (failure to testify and other constitutional rights). Other jurisdictions have expressed similar views. *Gunnerud v. State*, 611 P.2d 69, 75 (Alaska 1980) (failure to testify); *Adams v. State*, 263 Ark. 536, 566 S.W.2d 287, 389 (Ark.1978) (failure to testify); *People v. Rodgers*, 756 P.2d 980, 984–85 (Colo.1988) (right to jury trial); *Garron v. State*, 528 So.2d 353, 357 (Fla.1988) (use of insanity defense).

Each of these cases condemns attempts by the prosecution to penalize a defendant for the exercise of a constitutional right. The use of these various improper arguments creates an unfair inference of guilt, which is prohibited by the Constitution. In the case *sub judice*, the comment by the prosecutor appears to have simply been an isolated statement, because no other portion of the closing argument focused on the exercise of constitutional rights by the appellant. Therefore, in the opinion of this Court the comment does not warrant reversal of the jury's verdict. There is no merit to any part of this assignment of error, and it is denied by this Court.

VIII.

WERE THE JURY INSTRUCTIONS AT THE GUILT PHASE FUNDAMENTALLY FLAWED?

Here, Shell finds fault with the jury instructions given at the guilt phase of the trial because they "were very brief, and failed to fully apprise the jurors of the elements of the crime charged."

The State points out again that no objection was made to the jury instructions that are challenged as being deficient. Rule 5.03 of the Uniform Criminal Rules of Circuit Court Practice provides that "[a]t the conclusion of the taking of testimony the attorneys shall dictate into the record their specific objections to the requested instructions and specifically point out the grounds for objection." Notwithstanding the absence of objection to any instruction, this Court considered the instructions and finds no deficiency in the trial court's instructions taken as a whole. Since the jury was properly instructed, there is no merit to either portion of this assignment of error.

[10] Concluding the guilt/innocence phase of the trial, the jury returned a verdict of guilty to capital murder while engaged in the crime of robbery. The murder of Mrs. Audie Kirkland Johnson resulted from the assault upon her by the assailant using a tire tool; the jury found that assailant to be the defendant Robert Shell. The underlying crime of robbery is defined in Miss.Code Ann. § 97-3-79 as a "tak[ing] or attempt to take from the person or from the presence the personal property of another and against his will by violence...." The State proved the corpus delicti of robbery by establishing the disarranged condition of the victim's house when it was normally kept in a tidy condition. The removal of clothing from drawers, of guns from the gun rack and emptied billfolds was sufficient to evidence an attempted robbery. By statutory definition, the attempt to rob, as well as the robbery, constitutes the crime of robbery. Upon this proof, the confession of the defendant to the taking of money from the victims' purses is admissible. Thus, the corpus delicti of robbery is established. *Sullivan v. State*, 216 Miss. 809, 63 So.2d 212 (1953).

In addition to the above, this Court has held in a capital murder case that the corpus delicti in a homicide case is made up of two fundamental facts, the first, the death of the deceased, and the second, the fact of the existence of a criminal agency as to the cause of death. In *Gentry v. State*, 416 So.2d 650 (Miss.1982), this Court held that the admission of the confession to establish the corpus delicti of the underlying felony of robbery was proper so long as the corpus delicti of murder was sufficiently established. *Rhone v. State*, 254 So.2d 750 (Miss.1970); *Elliott v. State*, 183 So.2d 805 (Miss.1966). It is this Court's opinion that the evidence presented was sufficient to convince a rational factfinder of Shell's guilt of the crime of capital murder while engaged in the commission of robbery beyond a reasonable doubt.

SENTENCING PHASE

IX.

WAS THE JURY'S SENTENCING DETERMINATION PREDICATED ON THE CONSTANT INTERJECTION OF THE CHARACTER OF THE VICTIM AND HER FAMILY?

[11] Shell claims that the jury's sentence was based at least in part on character traits of the victim, which are not appropriate for the jury to consider during the sentencing phase. Shell bases his claim on the authority of *Booth v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), in which the U.S. Supreme Court invalidated the use of victim impact statements during sentencing of criminal defendants in capital murder trials. *See also, South Carolina v. Gathers*, 490 U.S. —, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989). The statements at issue in this case addressed Ms. Johnson's housekeeping habits and cannot in any way be characterized as victim impact statements. The proof was offered to support the State's proof of an attempted robbery and as such were admissible.

Initially, it should again be noted that no contemporaneous objection was made to any of this so-called objectionable testimony. The State urges that the point is therefore not preserved for appeal. *Lockett v. State*, 517 So.2d 1346, 1354 (Miss.1987); *Booker v. State*, 511 So.2d 1329, 1331 (Miss.1987).

Shell also cites *Fuselier v. State*, 468 So.2d 45 (Miss.1985), as support for his claim. That case addressed the prejudicial effect of having a member of the victim's family seated near the prosecutor's table, and had nothing to do with victim impact testimony. Therefore, it offers no benefit to Shell.

This testimony in no way resembles the victim impact testimony at issue in *Booth, supra*. In *Booth*, family and friends testified about the victim's personal characteristics, the emotional effect of the crimes on the victim's family, and the family's opinions of the crimes and the defendant. A footnote in *Booth* provides some insight into the difference between that case and this one.

> Our disapproval of victim impact statements at the sentencing phase of a capital case does not mean, however, that this type of information will never be relevant in any context. Similar types of information may well be admissible because they relate directly to the circumstances of the crime.

See fn. 16, 482 U.S. at 507, 107 S.Ct. at 2535, 96 L.Ed.2d at 451.

In the opinion of this Court, the testimony at issue here cannot be accurately characterized as victim impact testimony. As a consequence, there is no merit to this assignment of error.

X.

DID THE ADMISSION OF GRUESOME AND HIGHLY PREJUDICIAL PHOTOGRAPHS AT THE PENALTY PHASE,

AFTER A DETERMINATION THAT THEY WERE INADMISSIBLE AT THE GUILT PHASE, DEPRIVE SHELL OF HIS RIGHTS UNDER THE CONSTITUTION AND THE RULES OF EVIDENCE?

[12] The focus of this assignment of error is five (5) photographs of Mrs. Johnson's body taken at the autopsy. Four of these pictures reflect the appearance of the body prior to the autopsy and depict the nature of the wounds as first seen by the medical examiner. The fifth photograph shows the top portion of Mrs. Johnson's head with part of the hair shaved off to reveal the extent of the wounds. Shell asserts that these photographs were unnecessarily gruesome and served only to inflame and prejudice the jury.

This Court has recently addressed the admissibility of potentially gruesome photographs:

> While acknowledging that generally the admissibility of photographs is within the sound discretion of the trial judge and the admission is proper, so long as their introduction serves some useful evidentiary purpose. [sic] Williams contends that the close-up photographs were not necessary for the jury's understanding of the cause of death nor was the repetitive nature, and the result could only be to inflame and prejudice the jury.
>
> We have repeatedly admitted photographs of every description with the explanation that some "probative value" is present. *Johnson v. State*, 476 So.2d 1195, 1206 (Miss.1985); *Swanier v. State*, 437 [473] So.2d 180, 185 (Miss. 1985); *Cabello v. State*, 471 So.2d 332, 341 (Miss.1985); *Holliday v. State*, 455 So.2d 750, 752 (Miss.1984); *Billiot v. State*, 454 So.2d 445, 460 (Miss.1984). Abuse of discretion is sometimes explained to be admission of photographs when a killing is not contradicted or denied or the corpus delicti and the identity of the deceased have been established. *Sharp v. State*, 446 So.2d 1008, 1009 (Miss.1984); *Shearer v. State*, 423 So.2d 824, 827 (Miss.1982); *Williams v. State*, 354 So.2d 266, 267 (Miss.1978).

Williams v. State, 544 So.2d 782, 785 (Miss.1987).

This Court, however, did hold that a trial judge abused his discretion in *McNeal v. State*, 551 So.2d 151 (Miss.1989), where photographs of the "decomposed, maggot-infested body of the victim" were gruesome and lacked evidentiary purpose. The Johnson photographs are clearly distinguishable from both *Williams, supra*, and *McNeal, supra*. The pictures themselves provide graphic proof of the atrocious nature and extent of Mrs. Johnson's injuries, which gave evidentiary value to the aggravating circumstance of acts of an "heinous, atrocious, and cruel" nature.

Shell next questions how the disputed photographs could be inadmissible at the guilt phase, yet be admitted during the sentencing phase. The answer to this question can be found in *Jackson v. State*, 337 So.2d 1242 (Miss.1976), where this Court held that a bifurcated trial was necessary in capital murder cases "to overcome problems with respect to the introduction of evidence in a death penalty case, some of which would be relevant to the sentencing decision but would have no relevance to, or may even be prejudicial to the question of guilt." *Id.* at 1252. This case presents just such a situation, and the trial court properly held the photographs inadmissible during the guilt phase, but admissible for the sentencing phase on the issue of whether the crime was heinous, atrocious, or cruel. The same procedure has been followed in other decisions by this Court. *Leatherwood v. State*, 539 So.2d 1378, 1383 (Miss.1989); *Booker v. State*, 449 So.2d 209, 216–17 (Miss.1984); *Coleman v. State*, 378 So.2d 640, 648–49 (Miss. 1979).

Finally, Shell argues that the prosecution failed to make a successful showing of the heinous, atrocious, and cruel requirement in this case, and that they further failed to offer sufficient explanatory evidence when the photographs were introduced. During the sentencing phase of the trial, the prosecution asked the court to allow the re-introduction of the evidence and testimony from the guilt phase into evidence at the sentencing phase. This motion was granted by the trial court. The evidence reintroduced at this point included extensive testimony from Pat Eddings, of the Mississippi Medical Examiner's office, about the severity and scope of Mrs. Johnson's injuries. Robert Shell's own written statement to the Sheriff's department served as further substantiation of the nature of the injuries.

The trial court also gave the jury Instruction S–3, which defined the required elements for the crime at issue.

> The Court instructs the jury that in considering whether the capital offense was especially heinous, atrocious, or cruel, heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile; and cruel means designed to inflict a high degree of pain with indifference to, or even enjoyment of the suffering of others.

This jury instruction, combined with the other testimony and evidence presented by the prosecution, adequately defined and proved the "heinous, atrocious or cruel" nature of Mrs. Johnson's death at the hands of Robert Lee Shell. Additionally, there was sufficient explanatory evidence of the photographs when they were introduced. There is no merit to this assignment of error.

XI.

DID THE JURY INSTRUCTIONS AT THE PENALTY PHASE FAIL TO GUIDE THE JURY'S DISCRETION AS REQUIRED BY ARTICLE 3, SECTION 28 OF THE MISSISSIPPI CONSTITUTION AND THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

Article 3, § 28 of the Mississippi Constitution provides that "cruel or unusual punishment shall not be inflicted, nor excessive fines be imposed." U.S. Const. Amend. VIII. Under this assignment of error, Shell lists seven alleged defects in the jury instructions given by the trial court at the penalty phase of the trial. The State urges that Shell is procedurally barred from making this claim due to his failure to make a contemporaneous objection at trial. *Cole* and *Pinkney, supra*.

A.

[13] Under the first portion of this assignment of error, Shell claims that the instructions given to the jury were defective because they stated that the jury "may objectively consider the detailed circumstances of the offense for which the defendant was convicted, and the character and record of the defendant." Shell claims that this portion of the court's instruction C–1 was improperly given because the use of the word "may" allows the jury to permissively consider mitigating circumstances, instead of requiring them to do so. The U.S. Supreme Court cases relied on by Shell (*Hitchcock, Skipper*, and *Eddings*)[4] are factually distinguishable from the case at bar in that they forbid the placing of limitations on what mitigating factors the jury may consider. Such is not the case here.

The decisions of this Court do not place limitations on what mitigating circumstances the jury may consider.

> He may prove his lack of prior criminal record and may introduce such other evidence of his character or the particular circumstances of his crime that would be relevant in deciding whether he should be sentenced to death or life imprisonment.

Jackson v. State, 337 So.2d 1242, 1254 (Miss.1976). See also, *Cole v. State*, 525 So.2d 365, 371 (Miss.1987).

At a later point in Instruction C–1, the jury is told that if they find aggravating circumstances to be present, they then "*must* consider" whether mitigating circumstances are also present. There is no flaw in this portion of the jury instructions.

4. *Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987); *Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986); *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982).

B.

Secondly, Shell argues that the jury instructions shifted the burden of proof from the prosecution to the defense. The disputed language appears in Instruction C-1 and reads as follows:

> Next, to return the death penalty, you must find that the mitigating circumstances, those which tend to warrant the less severe penalty, life imprisonment—do not outweigh the aggravating circumstances—those which tend to warrant the death penalty.

This same issue was decided by this Court in *Jordan v. State*, 365 So.2d 1198 (Miss.1978):

> Essentially, Jordan contends that "the guidelines of *Jackson* appear to require the Defendant to shoulder the burden of proof on mitigating circumstances versus aggravating circumstances." *Jackson* simply holds, however, that one on trial for the charge involved here must be given an opportunity to present any "circumstances or combination of circumstances surrounding his life and character or the commission of the offense with which he is charged that would be reasonably relevant to the question of whether he should suffer death" or life imprisonment.

365 So.2d at 1206.

In *Gray v. Lucas*, 677 F.2d 1086 (5th Cir.1982), the Fifth Circuit considered Mississippi's death penalty statute, and concluded the following:

> Every mandatory element of proof is assigned to the prosecution. Neither the burden of production nor the burden of proof ever shifts to the defendant.

Id. at 1105–06. *See also, Stringer v. State*, 500 So.2d 928, 944 (Miss.1986).

Shell also contends that under the instructions given, death, not life, is presumed to be the proper sentence. This issue was disposed of in *Leatherwood v. State*, 435 So.2d 645 (Miss.1983), where this Court held that while one found guilty of capital murder occurring during a robbery becomes subject to the death penalty, this penalty is not automatic.

> The appellant's argument that he enters into the sentencing phase of the bifurcated trial with one strike against him is correct in one sense—i.e., if he had not been convicted of a capital offense, there would be no need for the sentencing hearing and he would simply be sentenced to serve a life term. This does not mean though that the procedure is unfair or faulty.

435 So.2d at 650.

Shell's reliance on *Jackson v. Dugger*, 837 F.2d 1469, 1473 (11th Cir.1988), is improper. In *Jackson*, the jury was *instructed* that death was the appropriate penalty. In the case *sub judice*, there was no such instruction. Therefore, there was no presumption that death was the proper sentence.

C.

Under Shell's third argument, he maintains that the jury should have been instructed that a life sentence should be assumed to be life without parole. There is no indication in the record of such an instruction ever being requested by the defense. This Court has held that such a failure serves as a bar to raising the point on appeal. *Stringer v. State*, 500 So.2d 928, 937 (Miss.1986); *Lockett v. State*, 517 So.2d 1317, 1333 (Miss.1987).

Additionally, this Court has rejected the merits of this very argument on several occasions. *Wilcher v. State*, 455 So.2d 727, 737 (Miss.1984); *Johnson v. State*, 416 So.2d 383, 391 (Miss.1982); *Bullock v. State*, 391 So.2d 601, 610 (Miss.1981). There is no merit to this claim.

D.

Shell's fourth claim is that it was error to not instruct the jury on the consequences of a failure to agree on punishment. Once again, no such instruction was ever requested. *Stringer, supra*, at 937; *Lockett, supra*, at 1333. The same argument on the merits was used by the appellant in *Stringer*, with no success.

> The argument creates an illusion of prejudice, which has no logical basis. If the jurors were unable to unanimously find that the aggravating circumstances were sufficient to impose the death penalty and that there were insufficient mitigating circumstances to outweigh the aggravating circumstances, then they could not return a death sentence. Further, in the event they could not unanimously agree after a reasonable period of deliberation, it would be the trial judge's duty under Miss.Code Ann. § 99–19–103 to dismiss the jury and impose a sentence of life imprisonment on the defendant.

500 So.2d at 945.

E.

Under Shell's fifth argument, he claims that the jury instructions failed to apprise the jury of their prerogative to exercise mercy. Again, no instruction was offered in this regard. *Stringer* and *Lockett, supra*. The merits of the issue have also been answered contra to Shell's position. This Court has held on several occasions that there is no right to a mercy instruction. *Williams v. State*, 544 So.2d 782, 788 (Miss.1987); *Nixon v. State*, 533 So.2d 1078, 1100 (Miss.1987); *Cabello v. State*, 471 So.2d 332, 348 (Miss.1985). Therefore, it would not have been error for the trial court to refuse to grant such an instruction, had one been requested.

F.

Shell's sixth claim centers around the adequacy of the instructions given to the jury concerning mitigating circumstances. Although conceding that his argument has long been rejected by this Court, Shell nonetheless maintains that the jury was never sufficiently informed that there need not be a unanimous finding of mitigating circumstances. This claim is without merit.

In *Stringer v. Jackson*, 862 F.2d 1108 (5th Cir.1988), the Fifth Circuit examined a jury instruction that dealt with mitigating circumstances, and in which the word "unanimous" appeared. The Court held the following:

> Although the trial court undoubtedly added "unanimously" by oversight as the third word in the instructions quoted below, a reading of the entire charge would not have led the jurors to think they were compelled to ignore mitigating circumstances (unless found unanimously) in determining an appropriate sentence for Stringer. The instructions given did not restrict the jury's right and power to consider the appropriateness of the death penalty even after it found that the aggravating circumstances outweighed the mitigating circumstances.

862 F.2d at 1112.

In the case at bar, the word "unanimous" or "unanimously" was not a part of the mitigating circumstances portion of the jury instructions. Instruction C-1 refers to a unanimous jury finding for aggravating circumstances, but there is no corresponding requirement for mitigating circumstances.

In addition to the language found in the jury instructions, defense counsel made the following statement during closing arguments:

> And if one of you feel like this man's entitled to mercy, when you get back into that room there and deliberate, you can hold out and say, "No, I want him to have some mercy." It takes only one of you to hold out for that mercy if that's what you choose to do. And regardless of who tries to persuade you or dissuade you, if you give up in yourself that he's entitled to mercy, then you hold out, because if you bolt at that point in time and end up convicting him, then you're going to be punished for the rest of your life. Did I do right? If I get that chance would I do that again?

G.

[14] Shell's final contention is that the instruction concerning the "heinous, atrocious, or cruel" aggravating factor failed to meet constitutional standards and that the limiting instruction given by the trial court was also vague. The limiting instruction, S–3, reads as follows:

> The court instructs the jury that in considering whether the capital murder was especially heinous, atrocious, or cruel, the word heinous means extremely

wicked or shockingly evil; atrocious means outrageously wicked and vile; and cruel means designed to inflict a high degree of pain with indifference to, or even enjoyment of the suffering of others.

Shell relies on *Maynard v. Cartwright*, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988) to support his assertion that the aggravating factor instruction was defective. *Maynard* is distinguishable from this case for several reasons. The U.S. Supreme Court in *Maynard* struck down a "heinous, atrocious, or cruel" instruction because there was no accompanying instruction defining those terms.

This Court pointed out in *Clemons v. State*, 535 So.2d 1354, 1363–64 (Miss.1988) that "[t]his Court has placed a limiting construction on 'especially heinous, atrocious, or cruel.'" This fact was also mentioned in *Woodward v. State*, 533 So.2d 418, 434 (Miss.1988). Although *Maynard* stated the need for a limiting instruction, no mention was made of the specific language needed to satisfy this requirement. 486 U.S. at ——, 108 S.Ct. at 1859–60, 100 L.Ed.2d at 382. This Court held in *Pinkney v. State*, 538 So.2d 329 (Miss.1988), that:

> [I]t is sufficient for us to hold that hereafter, capital sentencing juries of this State should and must be specifically instructed about the elements which may satisfy the aggravating circumstance of "especially heinous, atrocious, or cruel."

538 So.2d at 357.

No mention is made in *Pinkney* of the specific language requirements for the limiting instruction. The instructions at issue in this case appear to adequately define each of the three potential aggravating factors in terms the average layman (juror) could understand. The language used is neither vague nor unclear. Shell also questions the disjunctive language of the aggravating factor instruction, claiming that it is impossible to know whether some of the jury found the murder heinous, some atrocious, and some cruel. The cases relied on by Shell address criminal statutes which prohibit a series of distinct acts. In one of those cases, *United States v. Balistrieri*, 779 F.2d 1191 (7th Cir.1985), the Court stated:

> If the jury is told only to determine if the defendant violated the statute, some jurors could find him guilty because he performed one of the prohibited acts, while others might find him guilty because he performed another. The appearance of unanimity would be misleading, because the jury may have reached no agreement as to what the defendant actually did.

779 F.2d at 1224.

The problem being addressed in *Balistrieri* is not present here. Only one crime—the murder of Mrs. Johnson while in the commission of a robbery—was considered by the jury. The list of aggravating circumstances applies only to this one crime. The issue for the jury to determine was whether the aggravating circumstances as a whole applied to the murder of Mrs. Johnson, a question they answered in the affirmative. Furthermore, the jury found two aggravating circumstances overall, that the murder was committed during the course of a robbery, and that the murder was heinous, atrocious, or cruel. Even should this Court find that the aggravating circumstance challenged here is invalid, the remaining circumstance is sufficient to uphold the death sentence. *Clemons, supra*, at 1362.

This Court holds that there is no merit to any of the seven portions of this assignment of error, and, as a consequence, to the assignment of error as a whole.

XII

DOES THE AGGREGATION OF ERROR IN THIS CASE REQUIRE THE REVERSAL OF SHELL'S SENTENCE?

Having found no reversible error in this case, this Court holds that there is no aggregation of error so as to justify a reversal of Shell's conviction on this assignment. This Court affirms the guilt and sentencing phases of this trial.

PROPORTIONALITY REVIEW

IS THE SENTENCE OF DEATH DISPROPORTIONATE IN THIS CASE?

[15] Under his final assignment of error, Shell claims that, based on the facts of this case, the death penalty is an inappropriate punishment. Miss.Code Ann. § 99–19–105(3)(c) (1972), as amended, directs this Court to consider in death penalty cases, in addition to the assigned errors, the punishment imposed, as follows:

> (3) With regard to the sentence, the Court shall determine:
>
> (a) Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor;
>
> (b) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in Section 99–19–101; and
>
> (c) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

The facts of this case clearly showed that Mrs. Audie Johnson, a sixty-eight (68) year old widow, was brutally attacked and murdered on the morning of June 8, 1986. She died from a series of blows administered by a heavy metal object, which the prosecution maintained was a tire iron. She was repeatedly forcefully struck about the head with the tire iron, shattering numerous bones, creating swelling in her brain, and hemorrhaging. Mrs. Johnson was also severely cut several times during the attack, nearly severing the top half of one of her fingers in the process.

The evidence against Robert Lee Shell was very imposing. He gave a written confession to the Sheriff's office and a bloody shoe print matching the pattern of his tennis shoes was found at the scene. He also showed the Sheriff's office where he had thrown the tire iron, knife and gloves as he left the house. The only witness offered by the defense was Shell himself, and no alibi witnesses were offered.

The psychiatric evaluation revealed that Shell was a twenty-one (21) year old black male of average intelligence. He understood the charges against him, was qualified to assist his attorney during the course of trial, and did not suffer from any impairment of his memory. While there was some history of alcohol and substance abuse, there was no indication of any mental disorder.

Having made a thorough review of this record, this Court holds that as to the above Miss.Code Ann. § 99–19–105(3)(a), the death penalty was not the result of passion, prejudice, or any other arbitrary factor, that as to 3(b), the jury's finding of statutory aggravating circumstances is supported in the record; and that as to 3(c) the sentence of death is proportionate to the penalty imposed in similar cases, considering the defendant and the crime. (See Appendix). The Court, therefore affirms the penalty of death.

CONVICTION OF CAPITAL MURDER AND SENTENCE OF DEATH AFFIRMED. WEDNESDAY, JANUARY 10, 1990, SET AS DATE FOR EXECUTION OF SENTENCE IN THE MANNER PROVIDED BY LAW.

ROY NOBLE LEE, C.J., HAWKINS and DAN M. LEE, P.JJ., and ROBERTSON, SULLIVAN, ANDERSON, PITTMAN and BLASS, JJ., concur.

APPENDIX

DEATH CASES AFFIRMED BY THIS COURT

Turner v. State, — So.2d —— (DP–82, decided November 22, 1989).

Davis v. State, 551 So.2d 165 (Miss.1989).

Pinkney v. State, 538 So.2d 329 (Miss. 1989).

Clemons v. State, 535 So.2d 1354 (Miss. 1988).

Woodward v. State, 533 So.2d 418 (Miss. 1988).

Nixon v. State, 533 So.2d 1078 (Miss. 1987).

Cole v. State, 525 So.2d 365 (Miss.1987).

APPENDIX—Continued

Lockett v. State, 517 So.2d 1346 (Miss. 1987).

Lockett v. State, 517 So.2d 1317 (Miss. 1987).

Faraga v. State, 514 So.2d 295 (Miss. 1987).

Jones v. State, 517 So.2d 1295 (Miss. 1987).

Wiley v. State, 484 So.2d 339 (Miss.1986).

Johnson v. State, 477 So.2d 196 (Miss. 1985).

Gray v. State, 472 So.2d 409 (Miss.1985).

Cabello v. State, 471 So.2d 332 (Miss. 1985).

Jordan v. State, 464 So.2d 475 (Miss. 1985).

Wilcher v. State, 455 So.2d 727 (Miss. 1984).

Billiot v. State, 454 So.2d 445 (Miss. 1984).

Stringer v. State, 454 So.2d 468 (Miss. 1984).

Dufour v. State, 453 So.2d 337 (Miss. 1984).

Neal v. State, 451 So.2d 743 (Miss.1984).

Booker v. State, 449 So.2d 209 (Miss. 1984).

Wilcher v. State, 448 So.2d 927 (Miss. 1984).

Caldwell v. State, 443 So.2d 806 (Miss. 1983).

Irving v. State, 441 So.2d 846 (Miss. 1983).

Tokman v. State, 435 So.2d 664 (Miss. 1983).

Leatherwood v. State, 435 So.2d 645 (Miss.1983).

Hill v. State, 432 So.2d 427 (Miss.1983).

Pruett v. State, 431 So.2d 1101 (Miss. 1983).

Gilliard v. State, 428 So.2d 576 (Miss. 1983).

Evans v. State, 422 So.2d 737 (Miss. 1982).

King v. State, 421 So.2d 1009 (Miss. 1982).

APPENDIX—Continued

Wheat v. State, 420 So.2d 229 (Miss. 1982).

Smith v. State, 419 So.2d 563 (Miss. 1982).

Johnson v. State, 416 So.2d 383 (Miss. 1982).

Edwards v. State, 413 So.2d 1007 (Miss. 1982).

Bullock v. State, 391 So.2d 601 (Miss. 1980).

Reddix v. State, 381 So.2d 999 (Miss. 1980).

Jones v. State, 381 So.2d 983 (Miss.1980).

Culberson v. State, 379 So.2d 499 (Miss. 1979).

Gray v. State, 375 So.2d 994 (Miss.1979).

Jordan v. State, 365 So.2d 1198 (Miss. 1978).

Voyles v. State, 362 So.2d 1236 (Miss. 1978).

Irving v. State, 361 So.2d 1360 (Miss. 1978).

Washington v. State, 361 So.2d 61 (Miss. 1978).

Bell v. State, 360 So.2d 1206 (Miss.1978).

DEATH CASES REVERSED AS TO GUILT PHASE AND SENTENCE PHASE

West v. State, 553 So.2d 8 (Miss.1989).

Griffin v. State, — So.2d — (DP–68, decided August 10, 1989).

Leatherwood v. State, 548 So.2d 389 (Miss.1989).

Mease v. State, 539 So.2d 1324 (Miss. 1989).

Houston v. State, 531 So.2d 598 (Miss. 1988).

West v. State, 519 So.2d 418 (Miss.1988).

Davis v. State, 512 So.2d 1291 (Miss. 1987).

Williamson v. State, 512 So.2d 868 (Miss.1987).

Foster v. State, 508 So.2d 1111 (Miss. 1987).

Smith v. State, 499 So.2d 750 (Miss. 1986).

APPENDIX—Continued

West v. State, 485 So.2d 681 (Miss.1985).

Fisher v. State, 481 So.2d 203 (Miss. 1985).

Johnson v. State, 476 So.2d 1195 (Miss. 1985).

Fuselier v. State, 468 So.2d 45 (Miss. 1985).

West v. State, 463 So.2d 1048 (Miss. 1985).

Jones v. State, 461 So.2d 686 (Miss.1984).

Moffett v. State, 456 So.2d 714 (Miss. 1984).

Lanier v. State, 450 So.2d 69 (Miss.1984).

Laney v. State, 421 So.2d 1216 (Miss. 1982).

DEATH CASES REVERSED AS TO PUNISHMENT AND REMANDED FOR RESENTENCING TO LIFE IMPRISONMENT

Reddix v. State, 547 So.2d 792 (Miss. 1989).

Wheeler v. State, 536 So.2d 1341 (Miss. 1988).

White v. State, 532 So.2d 1207 (Miss. 1988).

Bullock v. State, 525 So.2d 764 (Miss. 1987).

Edwards v. State, 441 So.2d 84 (Miss. 1983).

Dycus v. State, 440 So.2d 246 (Miss. 1983).

Coleman v. State, 378 So.2d 640 (Miss. 1979).

DEATH CASES REVERSED AS TO PUNISHMENT AND REMANDED FOR A NEW TRIAL ON SENTENCING PHASE ONLY

Johnson v. State, 547 So.2d 59 (Miss. 1989).

Williams v. State, 544 So.2d 782 (Miss. 1989).

Lanier v. State, 533 So.2d 473 (Miss. 1988).

Stringer v. State, 500 So.2d 928 (Miss. 1986).

APPENDIX—Continued

Pinkton v. State, 481 So.2d 306 (Miss. 1985).

Mhoon v. State, 464 So.2d 77 (Miss.1985).

Cannaday v. State, 455 So.2d 713 (Miss. 1984).

Wiley v. State, 449 So.2d 756 (Miss.1984).

Williams v. State, 445 So.2d 798 (Miss. 1984).

DEATH CASES REMANDED

Leatherwood v. State, 539 So.2d 1378 (Miss.1989).

Abram v. State, 523 So.2d 1018 (Miss. 1988).

Jimmy Earl McCARTY

v.

STATE of Mississippi.

No. 07-KA-58683.

Supreme Court of Mississippi.

Dec. 6, 1989.

Defendant was convicted in the Circuit Court, Wayne County, Lester F. Williamson, J., of burglary, and he appealed. The Supreme Court, Anderson, J., held that: (1) failure to give defendant who was under arrest *Miranda* warnings prior to his interrogation violated defendant's right against self-incrimination, and (2) two burglaries allegedly committed by defendant were separate transactions or occurrences that could not be charged together in same indictment.

Reversed and remanded.

1. Criminal Law ⇐518(1), 532

In determining whether confession was freely and voluntarily given, circuit court sits as fact finder; trial judge first

NO. 89-7279

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER 1989 TERM

ROBERT LEE SHELL — PETITIONER

VERSUS

STATE OF MISSISSIPPI — RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. WHERE A QUESTION CONCERNING THE ADMISSIBILITY OF PHOTOGRAPHS, NOW FRAMED IN FEDERAL CONSTITUTIONAL TERMS, WAS NOT SO PRESENTED TO THE COURT BELOW, THIS COURT HAS NO JURISDICTION TO CONSIDER THE CLAIM.

II. THERE IS NO BASIS ON WHICH TO REMAND THIS CASE FOR RECONSIDERATION IN LIGHT OF McKOY v. NORTH CAROLINA.

III. THERE IS NO BASIS ON WHICH TO REMAND THIS CASE FOR RECONSIDERATION IN LIGHT OF CLEMONS v. MISSISSIPPI.

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NO. 89-7279

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PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BRIEF IN OPPOSITION

Respondent, State of Mississippi, respectfully prays that the Petition for Writ of Certiorari to the Supreme Court of the State of Mississippi be denied in this case.

OPINION BELOW

The opinion of the Mississippi Supreme Court is reported as Shell v. State, 554 So.2d 887 (Miss.1989). A copy of this opinion is before this Court as an appendix to the petition for certiorari.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court by way of a Petition for Writ of Certiorari through the authority of 28 U.S.C.A. Section 1257(3). He fails to do so.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED

Petitioner seeks to invoke the provisions of the Constitution of the United States, Amendment V, VI, VIII, and XIV.

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Petitioner was indicted for capital murder while engaged in the commission of the crime of armed robbery. The indictment was returned by the grand jury of the Circuit Court of Winston County, Mississippi during the October 1986 Term of that court. Trial began on November 5, 1987 and three days later the jury returned a verdict of guilty as charged. At the conclusion of the sentencing phase of the trial, the jury returned a sentence of death in proper form by the following verdict:

> We, the jury, unanimously find from the evidence beyond a reasonable doubt that the following facts existed at the time of the commission of the capital murder:
>
> 1. That the defendant actually killed Audie Kirkland Johnson;
>
> 2. That the defendant attempted to kill Audie Kirkland Johnson;
>
> 3. That the defendant intended that the killing of Audie Kirkland Johnson take place;
>
> 4. That the defendant contemplated that lethal force would be employed.
>
> We, the jury, unanimously find that the aggravating circumstances of:
>
> 1. The capital murder of Audie Kirkland Johnson was committed when Robert Lee Shell was engaged in the commission of the crime of armed robbery;

2. The capital murder of Audie Kirkland Johnson was especially heinous, atrocious, or cruel;

Are sufficient to impose the death penalty and that there are insufficient mitigating circumstances to outweigh the aggravating, and we unanimously find that the defendant should suffer death.

Tr. I. 65.

Shell then took his automatic appeal to the Mississippi Supreme Court raising thirteen (13) propositions. The case was briefed and orally argued before the court below. On November 29, 1989, the Mississippi Supreme Court, by a unanimous vote, affirmed the conviction and sentence of death in a written opinion. Shell v. State, 554 So.2d 887 (Miss.1989). A timely petition for rehearing was filed by petitioner with the court below and denied without opinion on December 20, 1989. From the opinion affirming the convictions and sentence of death petitioner brings this petition for certiorari.

B. FACTUAL HISTORY

This case began in the early morning hours of June 8, 1986, when Robert Lee Shell walked up to the home of Audie Kirkland Johnson with the intention of committing robbery and murder. Mrs. Johnson was a sixty-eight year old resident of Winston County whose husband had died approximately two weeks earlier. Because of this recent death, Mrs. Johnson had family members staying with her and on this early Sunday morning, her step-daughter Evelyn Lenaz was at the Johnson home.

Shell tried two doors to the house, but found them locked. He took a tire iron from a truck in the carport and, after an unsuccessful attempt to pry the kitchen door open, pried open the sliding glass door at the back of the house. Going down the hall, he found a light on in a bedroom and Mrs. Lenaz. He hit her in the head with the tire iron, and she fell to the floor. Shell continued down the hall to another bedroom where he turned the light on and found Mrs. Johnson. As Shell hit her over the head with the tire iron, she threw up her arms to protect herself, screamed and fell to the floor.

Hearing a door close down the hall, Shell ran back to the first bedroom, forced his way back into the room, and again hit Mrs. Lenaz over the head with the tire iron. As she fell, he hit her in the face. Shell returned to Mrs. Johnson's bedroom where he found that she had crawled to an adjoining bathroom. With Mrs. Johnson still on her knees, Shell beat her over the head with the tire iron until she fell to the bathroom floor. He then went back into the bedroom, found a pair of black gloves, and started "rambling".

Shell had removed some money from Mrs. Johnson's purse when he heard a noise from the bathroom. Returning to the bathroom, he took his knife and stabbed Mrs. Johnson two or three times. Shell then stood there, watching her breathe blood from her nose.

Shell returned to Ms. Lenaz's bedroom and took money from her purse. Ms. Lenaz was still alive. He then continued to "ramble" through the house, scattering papers and emptying

drawers, before eventually leaving through the sliding glass doors. Throwing the tire iron across the fence in the back yard, Shell began to walk home. He discarded the black gloves and the knife along the way. Reaching home he put his bloody shirt in the dirty clothes and went to bed.

At approximately 3 p.m. the following day, June 9, the pastor of the Johnsons' church received a call from Mrs. Lenaz who told him that she had been attacked. The Sheriff's Office was notified. Authorities found Mrs. Lenaz in a barely conscious state and Mrs. Johnson's body. Mrs. Lenaz survived the encounter, although with no memory of the events surrounding her attack. Mrs. Johnson had sustained massive head injuries, comminuted fractures, extensive bruises, cuts, subdural hemorrhaging, and heavy bleeding, which caused her death.

Based on an inconsistency between the stories told by Shell's father-in-law and Shell, the Sheriff of Winston County began questioning Shell. This resulted in his arrest and subsequent confessions to the murder and armed robbery. Shell later led authorities to some of the articles used in the crimes.

REASONS FOR DENYING THE WRIT

The question concerning the admissibility of photographs was not presented to the state court in federal constitutional terms. No interest concerning the federal constitution, a federal statute, or federal cases has been asserted by petitioner in the state-court proceedings. As the claim was not presented to the state courts at the time and manner required by law, this Court

has no jurisdiction to consider this question. Additionally, this issue differs considerably from the issue left unresolved by this Court in Thompson v. Oklahoma. Petitioner's portrayal of the photographs is inaccurate as is his claim that the photographs were not accompanied by explanatory testimony. Finally, the admissibility of photographs involves an evidentiary ruling by a state court which is not subject to review by this Court under its ruling in Lisenba v. California.

The jury was never instructed, either orally or in written form, that the finding of mitigating circumstances had to be unanimous. As the instructions did not prevent the jury or the individual jurors from considering and giving effect to the mitigating evidence presented, a Mills v. Maryland/McKoy v. North Carolina question is not raised.

As the lower court did not find either of the two aggravating circumstances invalid, Clemons v. Mississippi is inapplicable. There is no basis on which to remand this case for reconsideration in light of this Court's opinion in Clemons.

ARGUMENT

I. WHERE A QUESTION CONCERNING THE ADMISSIBILITY OF PHOTOGRAPHS, NOW FRAMED IN FEDERAL CONSTITUTIONAL TERMS, WAS NOT SO PRESENTED TO THE COURT BELOW, THIS COURT HAS NO JURISDICTION TO CONSIDER THE CLAIM.

It has long been held that the jurisdiction of this Court to re-examine the final judgment of a state court arises only upon a showing that the federal claim was adequately presented in the state court. Webb v. Webb, 451 U.S. 493, 101 S.Ct. 1889, 68

L.Ed.2d 392 (1981). After reviewing the relevant jurisdictional statute, 28 U.S.C.A. Section 1257(3), the Court's own rules, and the record of the case at hand, Webb held:

> We cannot conclude on this record that petitioner raised the federal claim that she now presents to this Court at any point in the state-court proceedings. Thus, we confront in this case the same problem that arose in Cardinale v Louisiana, 394 US 437, 438, 22 L Ed 2d 398, 89 S Ct 1161 (1969): "Although certiorari was granted to consider this question, . . . the sole federal question argued here has never been raised, preserved, or passed upon in the state courts below." Citing a long history of cases, we stated there that "[t]he court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions." Ibid. We have had several occasions to repeat this rule since then, Tacon v Arizona, 410 US 351, 352, 35 L Ed 2d 346, 93 S Ct 998 (1973); Moore v Illinois, 408 US 786, 799, 33 L Ed 2d 706, 92 S Ct 2562 (1972); Stanley v Illinois, 405 US 645, 656, n 10, 31 L Ed 2d 551, 92 S Ct 1208 (1972); Hill v California, 401 US 797, 28 L Ed 2d 484, 91 S Ct 1106 (1971); University of California Regents v Bakke, 438 US 265, 283, 57 L Ed 2d 750, 98 S Ct 2733 (1978)(opinion of Powell, J.), and we see no reason to deviate from it now.
>
> It is appropriate to emphasize again, see Cardinale v Louisiana, supra, at 439, 22 L Ed 2d 398, 89 S Ct 1161, that there are powerful policy considerations underlying the statutory requirement and our own rule that the federal challenge to a state statute or other official act be presented first to the state courts. These considerations strongly indicate that we should apply this general principle with sufficient rigor to make reasonably certain that we entertain cases from state courts only where the record clearly shows that the federal issue has been properly raised below.

451 U.S. at 498-99.

See: Buchanan v. Kentucky, 483 U.S. 402, n. 1 at 404, 107 S.Ct. 2906, 97 L.Ed.2d 336 (1987); Street v. New York, 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969); Cardinale v. Louisiana, 394 U.S. 437, 438, 89 S.Ct. 1161, 22 L.Ed.2d 398 (1969).

The question concerning the admissibility of photographs was not presented to the state court in federal constitutional terms. While the heading for the relevant proposition on direct appeal alleged that Shell was deprived of "his rights under the constitution and the rules of evidence", at no point did petitioner specify federal constitutional provision or right was violated. Instead, argument was based on state case law, state statute, and the state rules of evidence. Indeed, federal law was referred to only for the proposition that because a sentence of death is different, there is a corresponding difference in the need for reliability in the sentencing process.[1]

As can be seen from its opinion, it is clear that the Mississippi Supreme Court understood this question to concern solely the interpretation and application of case law. No where in its discussion did the lower court mention a federal issue or right or discuss the issue of the admissibility of photographs in

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[1] Woodson v. North Carolina, 428 U.S. 280, 305, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976); accord Gardner v. Florida, 430 U.S. 349, 357-58, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977); Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); Beck v. Alabama, 447 U.S. 625, 637-38, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980); Eddings v. Oklahoma, 455 U.S. 104, 118, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) (O'Connor, J., concurring).

federal constitutional terms. No where did the lower court expressly pass upon a federal question concerning the admissibility of photographs.

Finally, the petition for rehearing before the Mississippi Supreme Court included no federal claim. In short, no interest concerning the federal constitution, a federal statute, or federal cases has been asserted by petitioner in the state-court proceedings.

As Webb found:

> [T]here should be no doubt from the record that a claim under a federal statute or the Federal Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law.
>
> 451 U.S. at 501 (emphasis in original).

This claim was not presented to the state courts at the time and manner required by law. Therefore, this Court has no jurisdiction to consider this question.

Respondent will also address in the alternative petitioner's argument that this issue is on point with the alleged constitutional violation which remained unresolved by this Court's opinion in Thompson v. Oklahoma, 487 U.S. ___, 108 S.Ct. __, 101 L.Ed.2d 702 (1988). We disagree. This Court granted certiorari in Thompson to consider "whether photographic evidence that a state court deems erroneously admitted but harmless at the guilt phase, nevertheless violates a capital defendant's

constitutional rights by virtue of its being considered at the penalty phase. Id. at 709.

That is not the question here. In Thompson, the prosecutor introduced during the guilt phase three photographs of the victim's body which had been submerged in a river for almost four weeks. The Oklahoma Court of Criminal Appeals found that the use of two of these photographs was error, stating that the court failed to see "how they could possibly assist the jury in the determination of defendant's guilt." Id. at note 3. Although the photographs had been used during closing argument during the penalty phase, the Oklahoma court did not consider whether this was proper.

The question here is distinguishable on several points. The photographs were not admitted during the guilt phase as was the case in Thompson. They were not submitted to the jury to assist in the determination of guilt. Furthermore, there has been no ruling by the Mississippi Supreme Court that the photographs were introduced in error as occurred in Thompson. Just the opposite occurred. After reviewing evidentiary standards regarding the admissibility of photographs, the lower court found that the trial court followed the proper procedure in holding the photographs inadmissible during the guilt phase, but admissible during the sentencing phase on the specific issue of whether the crime was heinous, atrocious, or cruel. Shell v. State, 554 So.2d at 902. Thus, the unresolved question in Thompson does not correspond with the question presented here.

Furthermore, respondent feels compelled to correct two misconceptions presented by petitioner. Of the five photographs at issue, four reveal the appearance of Mrs. Johnson's body prior to the autopsy and depict the wounds as first seen by the medical examiner. Petitioner's argument here hinges on his portrayal of the fifth picture as one revealing the "mutilation" incidental to autopsy. This, quite simply, is inaccurate. The fifth photograph merely shows Mrs. Johnson's head with part of her hair shaved to reveal the nature of the wounds to her head. There has been no mutilation to the body by the medical examiner, only a preparatory procedure necessary to expose the mutilation caused by petitioner.

The second inaccuracy presented by petitioner is that there was no explanatory testimony for the photographs. In Footnote 2 to his petition, Shell states that there was not "sufficient" testimony to explain the photographs and that what little testimony there was was adduced at a hearing in limine before the trial court, but not the jury. Again, quite simply, this is inaccurate. It is also in direct contravention of the lower court's finding on this contention. All evidence and testimony from the guilt phase was re-introduced by the prosecution at the sentencing phase. Thus, the jury had before it the extensive testimony by staff from the state's Medical Examiner's office regarding the severity and scope of Mrs. Johnson's injuries[2]. If

[2]The in limine argument concerning the admissibility of these pictures during the guilt phase is immaterial to the question of the use of the pictures during the sentencing phase.

this substantiation of the nature of these injuries is not satisfactory to the petitioner, then there is the additional explanation of the injuries found in Robert Shell's own written statement to the Sheriff's department. Finally, the lower court specifically held that there was sufficient explanatory evidence of the photographs. Shell, 554 So. 2d at 903.

The Thompson Court found it unnecessary to reach the photographic evidence question as the case was disposed of on the principal issue. 101 L.Ed.2d at note 48. However, the dissenting opinion by Justice Scalia sets out what we believe is the final proper reason for denying the writ on this question.

> The photographs in question, showing gunshot wounds in the head and chest, and knife slashes in the throat, chest and abdomen, were certainly probative of the aggravating circumstance that the crime was "especially heinous, atrocious, or cruel. The only issue, therefore, is whether they were unduly inflammatory. We have never before held that the excessively inflammatory character of concededly relevant evidence can form the basis for a constitutional attack, and I would decline to do so in this case. If there is a point at which inflammatoriness so plainly exceeds evidentiary worth as to violate the federal Constitution, it has not been reached here. The balancing of relevance and prejudice is generally a state evidentiary issue, which we do not sit to review. Lisenba v California, 314 US 219, 227-228, 86 L Ed 166, 62 S Ct 280 (1941).
>
> 101 L.Ed.2d at 748 (emphasis added).

The admissibility of photographs is within the sound discretion of the state trial judge. The ruling thereon is an

The purpose of introduction went to two different matters during the respective phases.

evidentiary one not subject to review by this Court per its decision in Lisenba v. California, 314 U.S. 219, 62 S.Ct. 280, 86 L.Ed. 166 (1941). At issue in Lisenba were two snakes brought into the courtroom for identification. This Court held:

> We do not sit to review state court action on questions of the propriety of the trial judge's action in the admission of evidence. We cannot hold, as petitioner urges, that the introduction and identification of the snakes so infused the trial with unfairness as to deny due process of law. The fact that evidence admitted as relevant by a court is shocking to the sensibilities of those in the courtroom cannot, for that reason alone, render its reception a violation of due process.
>
> 314 U.S. at 228-29.

The Mississippi standards concerning admissibility of photographs were reviewed by the lower court who found that the trial judge had not abused his discretion by admitting the pictures. This evidentiary ruling should not be subjected to review by this Court.

II. THERE IS NO BASIS ON WHICH TO REMAND THIS CASE FOR RECONSIDERATION IN LIGHT OF McKOY V. NORTH CAROLINA.

The instructions given at the sentencing phase of this trial do not raise a Mills v. Maryland, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988), nor a McKoy v. North Carolina, 494 U.S. _, 110 S.Ct. ____, 108 L.Ed.2d 369 (1990), question. Therefore, certiorari should not be granted on this claim.

At no time was the jury instructed, either orally or through written form, that the finding of mitigating circumstances had to be unanimous. After requiring the jury to make a unanimous

Enmund[3] finding, the jury was required by Sentencing Instruction C-1 to "unanimously find, beyond a reasonable doubt, that one or more of the preceding aggravating circumstances exists in this case to return the death penalty." However, Instruction C-1 then dropped the requirement for unanimity by requiring the jury to "consider whether there are mitigating circumstances which outweigh the aggravating circumstances." The requirement for unanimity of Enmund findings and the finding of aggravating circumstances, but not the finding of mitigating circumstances, is carried over through the form of the verdict provided to the jury.

Because the instructions given made it clear that there did not have to be a unanimous finding of mitigating circumstances, neither Mills nor McKoy are applicable. In Mills, the petitioner's death sentence was vacated and the case remanded to the Maryland Court of Appeals because a majority of this Court concluded "that there is a substantial probability that reasonable jurors . . . may have thought they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular such circumstance." Id. at 384. At issue in Mills was a four part Findings and Sentence Determination Form which used the term unanimous in conjunction with the finding of mitigating circumstances. No such

---

[3] Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982).

requirement of unanimity, instruction, nor form of verdict at issue in Mills is at issue in the petition sub judice.

Similarly, North Carolina instructed the jury, both orally and in a written verdict form, to answer four questions in determining its sentence. One of the four questions asked: Do you unanimously find from the evidence the existence of one or more of the following mitigating circumstances?" McKoy, 108 L.Ed.2d at 376. This Court found that under its decision in Mills, the "unanimity requirement violates the Constitution by preventing the sentencer from considering all mitigating evidence." Id. Again, no where in the instructions at issue here was the jury told that the finding of mitigating circumstances had to be unanimous.

Petitioner contends that the lower court did not "acknowledge" this Court's decision in Mills and that it relied on the defense attorney's closing argument to substantiate its holding. Neither contention is accurate. The lower court framed the question at issue and immediately held it to be without merit. In relying on Stringer v. Jackson, 862 F.2d 1108 (5th Cir.1988), the court "acknowledged" that the Fifth Circuit Court of Appeals had discussed this Court's holding in Mills and had addressed an argument based thereon in the context of a Mississippi death penalty case. The court concluded its discussion of the claim simply by noting that "in addition to the language found in the jury instructions," defense counsel addressed the need for individualized consideration of mitigating

evidence during his close. Shell, 554 So.2d at 905. Thus while the argument was noted by the lower court, the court did not base its holding on this point.

At no point did the instructions prevent the jury or the individual jurors from considering and giving effect to the mitigating evidence presented. Thus this question presents no basis on which to remand this case for further consideration.

III. THERE IS NO BASIS ON WHICH TO REMAND THIS CASE FOR RECONSIDERATION IN LIGHT OF CLEMONS V. MISSISSIPPI.

Petitioner asserts that the recent decision in Clemons v. Mississippi, 494 U.S. ___, 110 S.Ct. ___, 108 L.Ed.2d 275 (1990), provided guidance on the application of Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), to the Mississippi capital sentencing process and requires reconsideration by the lower court of its opinion in this case. We disagree.

Maynard v. Cartwright considered a claim of vagueness directed at the aggravating circumstances of "especially heinous, atrocious, or cruel". This Court found that this language, without additional definition, did not provide sufficient guidance for the jury's sentencing discretion. 486 U.S. at 363-64. The opinion concluded by determining that because the Oklahoma Court of Criminal Appeals had no provision for saving a death penalty when one of several aggravating circumstances was found invalid, this Court would not attempt to do what the Oklahoma state courts refused to do. 486 U.S. at 365.

Clemons v. Mississippi continued the discussion of a Maynard claim, but that claim was not the "especially heinous" aggravating circumstance. Instead, Clemons discussed the process by which the Mississippi courts could save a death sentence should an aggravating circumstance be found invalid. That the aggravating circumstance found invalid by the lower court was that of "especially heinous, atrocious, or cruel" is coincidental.

As the lower court did not find an aggravating circumstance to be invalid in the case sub judice, Clemons is not applicable. On direct appeal, petitioner attacked the "especially heinous" aggravating circumstance. The lower court began its discussion of the issue by pointing out that the jury had been given a limiting instruction further defining the terms of the aggravating circumstance. Shell, 554 So.2d at 905. The court then rejected petitioner's reliance on Maynard v. Cartwright because in Maynard there was no accompanying instruction defining the terms of the aggravating circumstance.[4]

The opinion continued by pointing out that neither the decision in Maynard, 486 U.S. at 365, nor Mississippi's most recent decision on the issue, Pinkney v. State, 538 So.2d 329

[4]The Mississippi Supreme Court clearly did not "explicitly" rely on Clemons v. State, 535 So.2d 1354 (Miss.1988), to reject petitioner's attack on the "especially heinous" aggravating circumstance. Instead, reliance was placed on the fact that a limiting instruction was given as required. Thus whether the Mississippi Supreme Court also places a limiting instruction on the "especially heinous" aggravating circumstance, as can be inferred by that court's reference to Clemons v. State, is irrelevant because the jury here was properly instructed.

(Miss.1988), mandated specific language which would satisfy the requirements of a limiting instruction. The lower court then found:

> The instructions at issue in this case appear to adequately define each of the three potential aggravating factors in terms the average layman (juror) could understand. The language used is neither vague nor unclear.
>
> 554 So.2d at 906.

After rejecting petitioner's attack on this aggravating circumstance, the Mississippi Supreme Court further found that even if the attack had been successful and the circumstance found invalid, the remaining circumstance would be sufficient to uphold the death sentence. Id., citing to Clemons v. State, supra.

It is clear that the lower court did not find the "especially heinous" aggravating circumstance to be invalid in this case. Thus, Clemons v. Mississippi is inapplicable and there is no basis on which to remand this case for reconsideration in light of this Court's opinion in Clemons.

CONCLUSION

For the above and foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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ATTORNEY GENERAL
STATE OF MISSISSIPPI

CHARLENE R. PIERCE
SPECIAL ASSISTANT ATTORNEY GENERAL
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CERTIFICATE

I, Charlene R. Pierce, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above Brief in Opposition to the following:

Kenneth J. Rose, Esquire
923 Carolina Avenue
Durham, N.C. 27705

This the 3rd day of July, 1990.

Charlene R. Pierce
CHARLENE R. PIERCE

RN

S.L 8 PAGE 3 2

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

No. 89-7279

ROBERT LEE SHELL,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

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No. 89-7279

ROBERT LEE SHELL,

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STATE OF MISSISSIPPI,

Respondent.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

The Petitioner, ROBERT LEE SHELL, files the following Reply to Respondent's Brief in Opposition to his petition for a writ of certiorari to review the judgment of the Supreme Court of Mississippi affirming Petitioner's sentence to death by lethal gas.

REASONS FOR GRANTING THE WRIT

Petitioner respectfully suggests that Respondent errs in arguing that the Writ should not issue to consider tne following important constitutional questions:

I. WHETHER THERE IS ANY CONSTITUTIONAL LIMITATION ON THE INTRODUCTION OF GRUESOME, INFLAMMATORY PHOTOGRAPHS WHICH PURPORT TO SHOW THE VICTIM, WHEN THE JURY IS NOT TOLD THAT THERE HAS BEEN MUTILATION BY THE PATHOLOGIST DURING AUTOPSY?

Respondent makes various claims concerning this claim which vary from dubious to flatly inaccurate.

A. The issue was clearly presented to the Court below.

First, Respondent claims that the issue was not presented in federal constitutional terms in the Mississippi Supreme Court. In light of the pages of discussion in Mr. Shell's briefs to the court below on the issue of the unfairness of the introduction of gruesome photographs, it might be sufficient to state that this Court's "jurisdiction does not depend on citation to book and verse." Eddings v. Oklahoma, 455 U.S. 104, 113 n.9, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982); see also Picard v. Connor, 404 U.S. 270, 278, 92 S. Ct. 509, 30 L. Ed. 2d 438 (1971).

However, in point of fact Petitioner did cite the federal constitution by "chapter and verse." Respondent's contention that the issue was not presented to the lower court conveniently -- and unfairly -- ignores the explicit language raising the federal constitutional issues in Petitioner's brief to the court below.

Consider the following quotes from Mr. Shell's brief on direct appeal. Mr. Shell was careful to begin his brief by noting that, with respect to each issue presented, he was,

> . . . predicating each argument on all applicable aspects of the Fourth, Fifth, Sixth,

> Eighth and Fourteenth Amendments to the United States Constitution. . . .

Brief of Appellant, at 4 (emphasis supplied). This alone is more than sufficient to put paid to the argument that "nowhere did []he cite to the Federal Constitution. . . ." Webb v. Webb, 451 U.S. 493, 496, 101 S. Ct. 1889, 68 L. Ed. 2d 392 (1981).

When it came to arguing the issue of the gruesome photographs, Mr. Shell again cited federal constitutional law:

> Indeed, as the United States Supreme Court has repeatedly held, "[b]ecause of the qualitative difference [between death and any other form of punishment], there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. 280, 305, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976); accord Gardner v. Florida, 430 U.S. 349, 357-58, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977); Lockett v. Ohio, 438 U.S. 586, 604, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978); Beck v. Alabama, 447 U.S. 625, 637-38, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980); Eddings v. Oklahoma, 455 U.S. 104, 118, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982) (O'Connor, J., concurring).

Brief of Appellant, at 16. The same argument was reiterated in Mr. Shell's second brief. *See Appellant's Reply Brief, at 9.* Again, Respondent cannot honestly mean to now tell this Court that Petitioner never "cite[d] . . . to any cases relying on the . . . Federal Constitution." Webb v. Webb, 451 U.S. at 496.

Next, Mr. Shell argued that "in light of the greater protections required by the state and federal constitutions at the penalty phase, the trial court's finding that lesser protections

should apply is paradoxical at best." *Brief of Appellant, at 16 (emphasis supplied in part).*[1]

Again, on his Petition for Rehearing, Mr. Shell alleged that his rights had been violated, relying on "the Sixth, Eighth and Fourteenth Amendments to the Federal Constitution." *Petition for Rehearing, at 1.* The only issue presented in the Petition was the challenge to the admission of the gruesome photographs.[2]

Under any standard, then, it is clear that the issue is properly presented to this Court for review.

B. **Respondent also misrepresents the facts.**

Respondent next complains that an "inaccura[te argument] presented by petitioner is that there was no explanatory testimony for the photographs." *Brief in Opposition, at 11.*[3] Petitioner

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1. Petitioner also argued that such inflammatory evidence would rise to a "denial of due process. . . ." *Id. at 19; see also Appellant's Reply Brief, at 14* ("Mr. Shell was 'denied a fair trial'").

2. This alone would have been sufficient to preserve the issue. As this Court explicitly held in Hathorn v. Lavorn, 457 U.S. 255, 263, 102 S. Ct. 2421, 72 L. Ed. 2d 824 (1982), the Mississippi Supreme Court reaches the merits of issues raised for the first time on petition for rehearing. In any event, when all the argument is completed, it is clear that the Court did not just consider some evidentiary ruling as an alleged violation of a state rule. Quoting from Mr. Shell's brief, the State Supreme Court posed the question as whether the admission of gruesome photographs "deprive[d] Shell of his rights under the constitution and the rules of evidence?" Shell v. State, 554 So. 2d 887, 902 (Miss. 1989) (emphasis supplied).

3. The other alleged "inaccuracy" concerns the "mutilation" of the victim's body in one of the pictures. Without quibbling over the meaning of the word "mutilation", Petitioner merely invites this Court to look at the color picture in question, which is included in his brief to the lower court. *See Brief of Appellant, at 17.*

begs to differ, albeit without casting similar aspersions concerning the "accuracy" of Respondent's representations to this Court.

This Court will search the record in vain for a single reference to the pictures in question made by any witness before the jury.[4] The pictures were simply "introduced" by the prosecuting attorney, over vehement objection.

The question is not -- as argued by Respondent -- whether one of the pictures accurately represented the victim in the preparatory stages of the autopsy. To be sure, the "bloody" shorts in Miller v. Pate, 386 U.S. 1, 87 S. Ct. 785, 17 L. Ed. 2d 690 (1967), had come from the crime scene. The fundamental due process violation in Miller v. Pate was that the jury was arguably misled into believing that what was actually red paint was really blood.

Similarly, in this case nobody ever told the jury that the head of the victim had been shaved in preparation for autopsy. Indeed, nobody ever told the jury anything about what the pictures were meant to represent. Surely it would not be permissible to introduce pictures of dead bodies totally unrelated to the crime charged? To introduce altered pictures without explanation poses similar constitutional problems.

---

4. Petitioner concurs with Respondent's footnote concession that "[t]he in limine argument concerning the admissibility of these pictures during the guilt phase is immaterial to the question of the use of the pictures during the sentencing phase." *Brief in Opposition, at 11 n.2.* While evidence was introduced before the trial judge in support of the State's motion to admit the pictures, the jury never heard any of it.

C. The issue presented has caused a conflict in the lower courts, and should be addressed by this Court.

Respondent makes much of the fact that this case is distinguishable from Thompson v. Oklahoma, 487 U.S. ___, 108 S. Ct. ___, 101 L. Ed. 2d 702 (1988), where this Court granted certiorari on a very similar issue, but failed to resolve it. Respondent is correct to point out that in Thompson the pictures were introduced at the guilt phase, with evidence to explain what they were intended to depict. Arguing that there was no constitutional violation, Justice Scalia would have held that the pictures "were certainly probative of the aggravating circumstance that the crime was 'especially heinous, atrocious or cruel.'" Id., 101 L. Ed. 2d at 748 (Scalia, J., dissenting). Therefore the only question was "whether they were unduly inflammatory." Id.

In this case, since there was no evidence to explain what the pictures were meant to show, the prejudice was much greater. To the extent that Thompson may properly be distinguished from this case, then, the due process and Eighth Amendment challenges made here are far more compelling.

For the reasons set forth in Mr. Shell's original petition, therefore, this Court should grant certiorari to resolve the conflicting decisions in the lower courts.

II. WHETHER THIS CASE SHOULD BE REMANDED IN LIGHT OF McKOY v. NORTH CAROLINA?

Respondent argues that the case should not be remanded for further consideration in light of McKoy v. North Carolina, 494 U.S. ___, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990). The thrust of Respondent's argument is that McKoy and Mills v. Maryland, 486 U.S. 367, 108 S. Ct. 1860, 100 L. Ed. 2d 384 (1988), only apply to cases where the jury is explicitly told that mitigating evidence had to be ignored unless the jury found an applicable mitigating circumstance unanimously. *See Brief in Opposition, at 14-16.*

This may have been the narrower ground upon which Justice Kennedy chose to decide the case. See McKoy v. North Carolina, 108 L. Ed. 2d at 386-89 (Kennedy, J., concurring). However, it was not the rule set forth by the five justices who joined the majority opinion.

Indeed, this much is clear from the cases which have been remanded for reconsideration in light of McKoy. For example, while Huff v. North Carolina, No. 89-6260, ___ U.S. ___, 47 Cr. L. Rptr. 3088 (July 28, 1990), was remanded for further consideration in light of McKoy because the specific unanimity instruction was given, in McNeil v. North Carolina, 494 U.S. ___, 110 S. Ct. ___, 108 L. Ed. 2d 756 (1990), this Court vacated for further consideration in light of McKoy where no such instruction was given. Four justices dissented because the jury was not explicitly told that the verdict had to be unanimous. Id. at 756-57. The major-

ity, however, concluded that there was a reasonable probability that the jury might have believed that they had to be unanimous.

The same is true here. Indeed, the instructions in McNeil are indistinguishable from those given in this case. *See Exhibit A, at 461-66.* Considerations of comity require that the Mississippi Supreme Court be given the first crack at applying McKoy to this case. Similarly, considerations of judicial economy mandate that the issue should be reconsidered by the Mississippi Supreme Court expeditiously. A remand is just and appropriate. See also Petary v. Missouri, 494 U.S. ___, 110 S. Ct. ___, 108 L. Ed. 2d 931 (1990) (remanding for reconsideration in light of McKoy).

III. WHETHER THIS CASE SHOULD BE REMANDED IN LIGHT OF CLEMONS v. MISSISSIPPI?

Likewise, Respondent challenges the application of Clemons v. Mississippi, 494 U.S. ___, 110 S. Ct. ___, 108 L. Ed. 2d 725 (1990), to this case. In Clemons this Court recently provided guidance on the application of Maynard v. Cartwright, 486 U.S. ___, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), and Godfrey v. Georgia, 446 U.S. 420, 100 S. Ct. 1759, 100 L. Ed. 2d 398 (1980), to the Mississippi scheme. This Court held that, where a jury is told to weigh an invalid aggravating circumstance in the life-or-death decision, an appellate court cannot simply rubber-stamp the error where one other valid circumstance is present.

According to Respondent's tortured reading of Clemons, no case should be remanded unless the lower court explicitly held that the "especially heinous, atrocious or cruel" circumstance had been

explicitly held unconstitutional, leaving only the question of the improper inclusion of an invalid circumstance to decide.

It must be said that the jury was read an instruction requested by the State which purported to define the circumstance. See Shell v. State, 554 So. 2d at 903. This was the basis upon which the lower court upheld Mr. Shell's death sentence. Indeed, Respondent argues that this case should be "distinguished" from Maynard v. Cartwright "because in Maynard there was no accompanying instruction defining the terms of the aggravating circumstance." *Brief in Opposition, at 17.*

Respondent seems to have simply failed to read this Court's decision. Precisely the same "limiting" instruction was given by the Oklahoma court. See Cartwright v. Maynard, 822 F.2d 1477, 1488 (10th Cir. 1987) (en banc), aff'd sub nom. Maynard v. Cartwright, supra. The Tenth Circuit, and later this Court, rejected the notion that this instruction really lent any guidance at all to the jury. To the extent that the Mississippi Supreme Court was able to "distinguish" Maynard, the court misapplied the law.

The only basis upon which the Mississippi Supreme Court opinion therefore rests is that "the remaining circumstance would be sufficient to uphold the death sentence." *Brief in Opposition, at 18* (citing Clemons v. State, 535 So. 2d 1354 (Miss. 1989), rev'd sub nom. Clemons v. Mississippi, supra). As with other cases,[5] this Court should therefore vacate the death sentence, and allow

5. See, e.g., Pinkney v. Mississippi, 494 U.S. ___, 110 S. Ct. ___, 108 L. Ed. 2d 931 (1990); Stringer v. Black, 494 U.S. ___, 110 S. Ct. ___, 108 L. Ed. 2d 931 (1990).

the Mississippi Supreme Court the opportunity to address this issue in light of Clemons.

CONCLUSION

WHEREFORE, Petitioner respectfully requests that this Court grant his Petition for a Writ of Certiorari to review the decision of the Supreme Court of Mississippi.

Respectfully submitted,

Kenneth Rose

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Counsel for Petitioner,
Robert L. Shell

Certificate of Service

I do hereby certify that I have this day served a true and correct copy of the foregoing document by first class mail upon Marvin L. White, Jr., Assistant Attorney General, P.O. Box 220, Jackson, Ms. 39205-0220.

This the 9th day of August, 1990.

Kenneth Rose
M. Cass

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1989

No. 89-7279

ROBERT LEE SHELL,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

APPENDIX A

Excerpts from record on appeal in McNeil v. North Carolina, 494 U.S. ___, 110 S. Ct. ____, 108 L. Ed. 2d 756 (1990)

COURT: Members of the jury, having found the defendant Leroy McNeil guilty of first degree murder of Elizabeth Stallings and Deborah Fore, it is now your duty to recommend to the Court whether the defendant should be sentenced to death or to life imprisonment in each of these cases. Your recommendation will be binding upon this Court. If you unanimously recommend that this defendant be sentenced to death in either case, this Court will be required to impose a sentence of death in that case. If you unanimously recommend a sentence of life imprisonment in either case, and you must consider each case separately, the Court will be required to impose a sentence of life imprisonment in the State's prison.

Now all of the evidence relevant to your recommendation has been presented. There is no requirement to resubmit during the sentencing procedure any evidence that was submitted during the guilt phase of this case. All of the evidence wnich you heard in both phases of the case is competent for your consideration in recommending punishment.

It is now your duty to decide from all of the evidence presented in both phases what the facts are. You must then apply the law which I am about to give you concerning punishment to those facts. It is absolutely necessary that you understand and apply the law as I give it to you, and not as you think it is, or might like it to be.

This is important, because justice requires everyone who is sentenced for first degree murder have the sentence recommendation determined in the same manner, and have the same law applied to him.

You, ladies and gentlemen, as the triers of fact, are again the sole judges of the credibility of each witness. You must decide for yourselves whether to believe the testimony of any witness. You may believe all, or any part, or none of what a witness has said on the stand.

In determining whether to believe any witness, you should apply those same tests of truthfulness which you apply in your everyday affairs in making your most important business decisions. As applied to this trial, these tests may include, among others, the following: The opportunity of a witness to see, hear, know or remember the facts or occurrences about which he or she has testified; the manner and appearance of a witness; any interest, bias or prejudice the witness may have; the apparent understanding and fairness of the witness, whether the witness' testimony is reasonable and whether the witness' testimony is consistent with other believable evidence in the case.

You are again the sole judge of the weight to be given any evidence. By this I mean, if you decide that certain evidence is believable you must then determine the importance of that evidence in light of all other believable

evidence in the case.

Now at this time, ladies and gentlemen, I shall very briefly summarize what some of the evidence presented by the State and some of the evidence presented by the defendant tends to show as to these two cases. In the case of the State of North Carolina versus Leroy McNeil, involving the first murder of Elizabeth Stallings, the State has offered evidence tending to show that on or about the 8th day of April, 1983,the defendant Leroy McNeil and his wife picked up the deceased, Elizabeth Faye Stallings, and they picked up Ms. Stallings with the inducement that they would go somewhere to party, to engage in activities together. That initially this was presented to Ms. Stallings as a very friendly kind of meeting. The defendant and Penny McNeil took Elizabeth Stallings to an abandoned house next to their house on the pretense of securing some controlled substances from that house. That through this ruse they were eventually able to get Elizabeth Stallings into the house and that at that time, consistent with the prearranged plan to do so, they proceeded to effectuate a robbery of the food stamps which Elizabeth Stallings had in her possession. Leroy McNeil took the food stamps from her; he beat her; he stabbed her; took her clothes off and that after securing a rifle, he shot her in the head and killed her. Now this was some of the evidence offered by the State as to that

case tends to show.

The State additionally, as to that case and to the case involving the murder of Deborah Fore, at the sentencing hearing offered evidence tending to show that on the 18th day of May, 1977, Leroy McNeil entered a plea of guilty and was therefore convicted of the voluntary manslaughter of Cynthia Latham McNeil.

As to the case of State of North Carolina versus Leroy McNeil, involving the first degree murder of Deborah Fore, the State offered evidence tending to show that on or about the 10th day of April of 1983, the defendant Leroy McNeil discussed with his wife the fact that they needed money. That pursuant to that, he called Deborah Fore, an individual that he thought might have some money, on the pretense of taking her out on a date. Eventually, the defendant and Penny McNeil went to Deborah Fore's house. She got in the car with them, needing a ride to the store. That they drove around, finally driving to a secluded area of Wake County. At that time the defendant indicated that a tire on his car was going flat, as one actually was. He went back to the back of his car, opened the trunk. Prior to doing so, he had taken a pistol out from under the seat and armed himself with it. Eventually Deborah Fore got out of the car and came back to where the defendant was to see what the problem was with the tire. The defendant thereafter shot

Deborah Fore in the head with the pistol, causing her death. After the defendant shot Deborah Fore, he removed from her person a small amount of U.S. currency, her keys and other items of personal property.

The defendant, as to each of these cases, has offered evidence tending to show that the defendant had been drinking heavily prior to the incident involving Elizabeth Stallings and prior to the incident involving Deborah Fore. The defendant was, in fact, an alcoholic, a habitual drinker and that his drinking impaired his judgment and his inhibitions and impaired his capacity to recognize the criminality of either of the acts.

The defendant further offered evidence tending to show that the defendant is an individual with a relatively low IQ; in fact, is borderline mentally retarded. That after his arrest and at his specific request he met with law enforcement officers and made a full and complete statement concerning all of these incidents.

Further, the defendant offered evidence tending to show that the defendant had been employed with a construction company here in Wake County and that he worked hard at that job. That even though he had some absentee problems related to his drinking, that he was a hard-working employee of that construction company.

This is what some of the evidence offered by the

defendant as to each of these cases and in this sentencing hearing tends to show. Both as to the evidence offered by the State and the evidence offered by the defendant, I have summarized the evidence only very briefly. You should consider all of the evidence and if your recollection differs from mine, rely upon your own.

Additionally, I have only related what the evidence for the State and the evidence for the defendants tends to show, not what it does show, because, you, ladies and gentlemen, are the finders of the fact and, therefore, only you determine what the evidence does show.

So I charge that for you to recommend that this defendant be sentenced to death in either, in either the Stallings case or the Fore case, the State must prove three things from the evidence beyond a reasonable doubt. Now a reasonable doubt is a doubt based on reason and common sense, arising out of some or all of the evidence that has been presented, or lack or insufficiency of the evidence, as the case may be. Proof beyond a reasonable doubt is proof that fully satisfies or entirely convinces you of each of the following things:

First, that one or more aggravating circumstances exist.

Two, that any mitigating circumstances you have found are insufficient to outweigh any aggravating

circumstances you have found.

Third, that any aggravating circumstances you have found are sufficiently substantial to call for the imposition of the death penalty when considered with any mitigating circumstances that you have found.

Again, it will be your responsibility to consider the aggravating and the mitigating circumstances separately as to each case and to make a separate decision as to each case. If in either case or in both you unanimously find all three of these things beyond a reasonable doubt, it would be your duty to recommend that this defendant, Leroy McNeil, be sentenced to death. If you do not so find or if you have a reasonable doubt as to one or more of these things, in either case, then it would be your duty to recommend that the defendant be sentenced to life imprisonment in that case.

When you retire to deliberate your recommendations as to punishment, you will take with you two forms, one for each case, entitled "Issues and Recommendations as to Punishment." This form contains a written list of four issues relating to aggravating and mitigating circumstances. I will now take up these four issues in each case with you in greater detail, one by one, to enable you to follow me more easily. The bailiff will now give each of you a copy of two forms, each entitled "Issues and Recommendations as

to Punishment." One form relates to the Deborah Fore case and that is indicated in the caption at the top of that form. The other form relates to the Elizabeth Stallings case and that is indicated in the caption at the top of that form. Mr. Sheriff, will you distribute one copy of these to each juror. Ladies and gentlemen, please do not read ahead in the form, simply follow them with me as I go through them.

Issue: Number One in the case involving the first degree murder of Elizabeth Faye Stallings reads as follows:

Do you unanimously find from the evidence, beyond a reasonable doubt, the existence of one or more of the following aggravating circumstances in the case, in the murder involving Elizabeth Stallings?

In the case involving first degree murder of Deborah Fore would read as follows:

Do you unanimously find from the evidence, beyond a reasonable doubt, the existence of one or more of the following aggravating circumstances?

In the case involving the first degree murder of Elizabeth Faye Stallings, three possible aggravating circumstances are listed on the form and you should consider each of them before you answer Issue Number One. Two possible aggravating circumstances are listed on the form in the case involving Deborah Fore and you should consider each of them before you answer Issue Number One.

Now the State must prove from the evidence beyond a reasonable doubt the existence of any aggravating circumstance, and, before you may find any aggravating circumstance you must agree unanimously that it has been so proven. An aggravating circumstance is a group of facts which tend to make a specific murder particularly deserving of the maximum punishment prescribed by law, that being death. Our law identifies the aggravating circumstances which might justify a sentence of death. Only those circumstances identified by statute may be considered by you as an aggravating, as aggravating circumstances. Under the evidence in the case involving the first degree murder of Elizabeth Stallings, three possible aggravating circumstances may be considered. Under the evidence in the case involving the first degree murder of Deborah Fore, two possible aggravating circumstances may be considered. The following are the aggravating circumstances which may be applied to these cases.

First, the first aggravating circumstance, if it applies at all, would under the evidence in this case apply in both cases. It reads as follows:

First, has Leroy McNeil been previously convicted of a felony involving the use of violence to the person?

[Now voluntary manslaughter is by definition a felony involving the use of violence to the person.] Voluntary manslaughter

is defined as the intentional and unlawful killing of a human being without malice, without premeditation and without deliberation.

A person has been previously convicted, if he has been convicted and not merely charged and if his conviction is based upon conduct which occurred before the events out of which these murders arose.

So if you find from the evidence beyond a reasonable doubt that on or about the 18th day of May, 1977, in Mecklenburg County, Leroy McNeil had been convicted of voluntary manslaughter of Cynthia Latham McNeil and that he, Leroy McNeil, killed Elizabeth Stallings and Deborah Fore after he committed this voluntary manslaughter, then you would find this aggravating circumstance and would so indicate by having your foreperson write "Yes" in the space after this aggravating circumstance on the Issues and Recmendation Form of the Stallings case and the Fore case as appropriate.

If you do not so find or have a reasonable doubt as to one or more of these things, then you will not find this aggravating circumstance and will so indicate by having your foreperson write "No" in that space in the Stallings case and in the Fore case as appropriate.

Second, was the murder, was this murder of Elizabeth Faye Stallings committed by Leroy McNeil while Leroy

McNeil was engaged in the commission of robbery with a firearm?

Additionally, second, was this murder committed by Leroy McNeil while Leroy McNeil was engaged in the commission of robbery with a firearm as related to the murder of Deborah Fore?

As to this potential aggravating circumstance, you should consider the evidence separately in each of the two cases and you should focus separately on this issue in each of the two cases and your answer would be based upon your evaluation of the evidence as it relates to each of the two cases separately.

Robbery with a firearm is the taking and carrying away of any personal property of another from her person or in her presence without her consent by endangering or threatening a person with a firearm, with the intent to deprive her of the use of property permanently, the taker knowing that he was not entitled to take that property.

If you find from the evidence beyond a reasonable doubt that Leroy McNeil killed Elizabeth Stallings--excuse me, that when Leroy McNeil killed Elizabeth Stallings, Leroy McNeil was taking and carrying away a quantity of food stamps from the person and presence of Elizabeth Stallings without her voluntary consent, by endangering or threatening Elizabeth Stallings with a firearm, Leroy McNeil knowing that he was

not entitled to take these food stamps and intending at that time to deprive Elizabeth Stallings of their use permanently, then you would find this aggravating circumstance in the Elizabeth Stallings case. You would so indicate by having your foreperson write "Yes" in the space after this aggravating circumstance on the Issues and Recommendations Form of the Elizabeth Stallings case.] [.....86

If you do not so find or have a reasonable doubt as to one or more of these things, then you will not find this aggravating circumstance and will so indicate by having your foreperson write "No" in that space.

[Turning now to the case involving the first degree murder of Deborah Fore. If you find from the evidence beyond a reasonable doubt when Leroy McNeil killed Deborah Fore, Leroy McNeil was taking and carrying away U.S. currency, keys and other items of personal property from the person and presence of Deborah Fore without her consent, by endangering or threatening Deborah Fore with a firearm, specifically a pistol, Leroy McNeil knowing that he was not entitled to take this personal property and intending at that time to deprive Deborah Fore of the use of the property permanently, then you will find this aggravating circumstance and would so indicate by having your foreperson write "Yes" in the space provided after this aggravating circumstance on Issues and Recommendations Form in the

Deborah Fore case.] Exception No. 87

If you do not so find or have a reasonable doubt as to one or more of these things, then you will not find this aggravating circumstance and will so indicate by having your foreperson write "No" in that space in the Deborah Fore case.

Only in the Elizabeth Stallings case there is a third aggravating circumstance, third potential aggravating circumstance for your consideration. It reads as follows:

[Three, was the murder of Elizabeth Stallings especially heinous, atrocious or cruel?

Again this aggravating circumstance may not be considered in the Deborah Fore case.

Okay. In this context heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile; and cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. However, it is not enough that this murder of Elizabeth Stallings be heinous, atrocious or cruel as those terms have just been defined. This murder must have been especially heinous, atrocious or cruel, and not every murder is especially so. For this murder to have been especially heinous, atrocious or cruel, any brutality which was involved in it must have exceeded that which is normally present in any killing. This murder

must have been a murder without conscience or pitiless crime which was unnecessarily tortuous to the victim, Elizabeth Stallings. If you find from the evidence beyond a reasonable doubt that this murder of Elizabeth Stallings was especially heinous, atrocious or cruel, you would find this aggravating circumstance in that case and would so indicate by having your foreperson write "Yes" in the space after this aggravating circumstance on the Issues and Recommendations Form of Elizabeth Stallings.] Exception No. 88

If you do not so find or have a reasonable doubt as to one or more of these things, then you will not find this aggravating circumstance in the Elizabeth Stallings case and will so indicate by having your foreperson write "No" in that space.

Now if you unanimously find from the evidence, beyond a reasonable doubt, one or more, that one or more of these aggravating circumstances existed in a particular case and have indicated by writing "Yes" in the space after one or more of them on the Issues and Recommendations Form of that particular case, then you would answer Issue One "Yes" in that case.

If you do not unanimously find from the evidence, beyond a reasonable doubt, that at least one of these aggravating circumstances existed and if you have so indicated by writing "No" in the space after every one of the

potential aggravating circumstances for that particular case, then you would answer Issue One "No" in that case.

If you answer Issue One "No" in a particular case, you would skip Issues Two, Three and you must recommend that this defendant be sentenced to life imprisonment.

If you answer Issue One "Yes" in a particular case then you would consider Issue Two.

Issue Two reads as follows:

Do you find from the evidence the existence of one or more of the following mitigating circumstances?

Now in each of the two cases six possible mitigating circumstances are listed on the form. You should consider each of them before answering Issue Two in each case.

A mitigating circumstance is a fact or group of facts which do not constitute a justification or excuse for a killing, or reduce it to a lesser degree of crime than first degree murder, but which may be considered as extenuating or reducing the moral culpability of the killing or making it less deserving of extreme punishment than other first degree murders. Our law identifies several possible mitigating circumstances. However, in considering Issue Two, it would be your duty to consider as a mitigating circumstance any aspect of the defendant's character or record and any of the circumstances of a particular murder that the

defendant contends is a basis for a sentence less than death, and any other circumstances arising from the evidence that you deem to have mitigating value.

The defendant has the burden of proving to you that a given mitigating circumstance exists. The existence of any mitigating circumstance must be established by a preponderance of the evidence, that is, the evidence taken as a whole must satisfy you, not beyond a reasonable doubt, but simply satisfy you that any mitigating circumstance exists. If the evidence satisfies you that a mitigating circumstance exists, you would find that circumstance; if not, you would not find it. In either event, you would move on to consider the other mitigating circumstances and continue in like manner until you have considered all of the mitigating circumstances listed on the form and any others which you deem to have mitigating value.

Now it is your duty to consider the following mitigating circumstances and any others which you find from the evidence.

First--and this would apply, if at all, in each case. First, consider whether Leroy McNeil has no significant history of prior criminal activity. Significant means important or notable. Whether any history of prior criminal activity is significant is for you to determine from all of the facts and circumstances which you find from the evidence.

However, you should not determine whether it is significant only on the basis of the number of convictions, if any, in the defendant's record. Yet you should consider the nature and quality of the defendant's history, if any, in determining whether it is significant. You would find this mitigating circumstance if you find that the defendant Leroy McNeil has only been convicted of voluntary manslaughter and that this is not a significant history of prior criminal activity.

Now the second possible mitigating circumstance, and you will have to, as to this mitigating circumstance, focus on the evidence as related to each of the two cases and such of the evidence that might relate to both of the cases, but you should consider this potential mitigating circumstance separately in each of the two cases. This potential mitigating circumstance reads as follows:

Consider whether the capacity of Leroy McNeil to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired.

A person's capacity to appreciate the criminality of his conduct or to conform his conduct to the law is not the same as his ability to know right from wrong generally, or to know that what he is doing at a given time is killing or that such killing is wrong. A person may indeed know that a killing is wrong and still not appreciate its

wrongfulness because he does not fully comprehend or is not fully sensible to what he is doing or how wrong it is. Further, for this mitigating circumstance to exist, the defendant's capacity to appreciate does not need to have been totally obliterated. It is enough that it was lessened or diminished. Finally, this mitigating circumstance would exist, even if the defendant did appreciate the criminality of his conduct, if his capacity to conform to the law was impaired, since a person may appreciate that his killing is wrong and still lack the capacity to refrain from doing it. Again, the defendant need not wholly lack all capacity to conform. It is enough that such capacity as he might otherwise have had in the absence of voluntary intoxication is lessened or diminished because of such voluntary intoxication.

You would find this mitigating circumstance in the case involving the first degree murder of Elizabeth Stallings if you find that Leroy McNeil had drunk a large quantity of intoxicating liquor prior to the killing of Elizabeth Stallings and that this impaired his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.

You would find this mitigating circumstance in the case involving the first degree murder of Deborah Fore if you find that Leroy McNeil had drunk a large quantity of

intoxicating liquor prior to the killing of Deborah Fore and that this impaired his capacity to appreciate the criminality of his conduct or to conform his conduct to the law.

Now the third possible mitigating factor or circumstance which you should consider is this:

That Leroy McNeil confessed to the crime and did so shortly after the crimes were committed.

Now this would apply, if at all, equally in both cases. If you find from the evidence that the defendant confessed to these crimes and did so shortly after the crimes were committed and that this has mitigating value, then you would find this mitigating circumstance.

Fourth, the defendant Leroy McNeil has an IQ of 78 and is borderline mentally retarded.

This mitigating circumstance would apply, if at all, in both cases. If you find from the evidence, based upon the preponderance of the evidence, that the defendant has an IQ of 78 or a low IQ and is borderline mentally retarded and if you find that this has mitigating value, then you would find this mitigating circumstance.

Fifth, the defendant Leroy McNeil had been a good and useful employee for Rea Construction Company prior to the events of April, 1983.

This would apply, if at all, to both of the cases.

If you find from the evidence and by the preponderance of the evidence that Leroy McNeil had been a good and useful employee for Rea Construction Company prior to April, 1983, and if you find that this has mitigating value, then you would find this mitigating circumstance.

Six, finally, you may consider any other circumstance or circumstances arising from the evidence which you deem to have mitigating value, including any aspect of the defendant's character or reputation or record, or any of the circumstances of this murder which you deem to have mitigating value.

If in a particular case you find one or more mitigating circumstances, then you would answer Issue Two "Yes" for that case. If you do not find at least one mitigating circumstance from the evidence, then you would answer Issue Two "No" in that case. Again, you are to consider each of the cases separately. If you answer Issue Two "Yes," then you must consider Issue Three for that case. If you answer Issue Two "No," in one or both of the cases, then as to the case you answer Issue Three "No"--excuse me, as to the case that you answer Issue Two "No," you would skip Issue Three and answer Issue Four.

Issue Three reads:

Do you unanimously find beyond a reasonable doubt that the mitigating circumstance or circumstances found by

you is, or are, insufficient to outweigh the aggravating circumstance or circumstances found by you?

You will consider this issue separately in each case. You will consider it separately in the Elizabeth Stallings case and in the Deborah Fore case. If you find from the evidence one or more mitigating circumstances in one or the other, or both cases, you must weigh the aggravating circumstances found by you in that particular case against the mitigating circumstances found by you in that particular case. In doing so, you are the sole judges of the weight to be given to any individual circumstance which you find, whether aggravating or mitigating. You should not merely add up the number of aggravating circumstances and mitigating circumstances. Rather, you must decide from all the evidence what value to give to each circumstance. Then you must weigh the aggravating circumstances of that particular case, so valued, against the mitigating circumstances of that particular case, so valued, and determine whether the mitigating circumstances outweigh the aggravating circumstances.

In each case if you unanimously find beyond a reasonable doubt the mitigating circumstances found by you in that particular case are insufficient to outweigh the aggravating circumstances found by you in that particular case, you would answer Issue Three "Yes" in that case. If

you do not so find or have a reasonable doubt as to whether they do, you would answer Issue Three "No" in that case. If you answer Issue Three "No" in any case, in either of the two cases, as to that case, it would be your duty to recommend that the defendant be sentenced to life imprisonment. If you answer Issue Three "Yes" in a particular case, then it would be your responsibility to consider Issue Four in that particular case.

Issue Four reads as follows:

Do you unanimously find beyond a reasonable doubt that the aggravating circumstance or circumstances found by you is, or are, sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances found by you?

If you reach Issue Four in either or both cases, you should consider it separately as to the Stallings case and as to the Fore case. In deciding this issue, you are not to consider the aggravating circumstances standing alone. You must consider them in connection with any mitigating circumstances found by you in a particular case. After considering the totality of the aggravating and mitigating circumstances, you must be convinced beyond a reasonable doubt that the imposition of the death penalty is justified and appropriate in that case before you can answer the issue "Yes." In doing so, you are not applying a

mathematical formula. For example, three circumstances of one kind do not automatically and of necessity outweigh one circumstance of another kind. The number of circumstances found is only one consideration in determining which circumstances outweigh others. You may very properly emphasize one circumstance more than another in a particular case. You must consider the relative substantiality and persuasiveness of the existing aggravating and mitigating circumstances in making this determination. You, the jury, must determine how compelling and persuasive the totality of the aggravating circumstances are when compared with the totality of the mitigating circumstances found by you. After so doing, if you are satisfied beyond a reasonable doubt that the aggravating circumstances found by you are sufficiently substantial to call for the death penalty, then it would be your duty to answer that issue "Yes" in that particular case. If you are not so satisfied or have a reasonable doubt, then it would be your duty to answer the issue "No" in that particular case.

In the event that you do not find existence of any mitigating circumstances, you must still answer this issue. In such case, you must determine whether the aggravating circumstances found by you are of such value, weight, importance, consequence, or significance as to be sufficiently substantial to call for the imposition of the death

penalty. Substantial circumstances may be contras.ed with circumstances that are enuous, flimsy, abstract, imaginary, deceptive, or negligible.

Substantial means having substance or weight, important, significant or momentous. Aggravating circumstances may exist in a particular case and still not be sufficie..tly substantial to call for the death penalty. Therefore, it is not enough for the State to prove from the evidence beyond a reasonable doubt the existence of one or more aggravating circumstances. It must also prove beyond a reasonable doubt that such aggravating circumstances are sufficiently substantial to call for the death penalty, and before you may answer Issue Four "Yes" in either case, you must agree unanimously that they are.

If you answer Issue Four "No" in a particular case, you must recommend that this defendant be sentenced to life imprisonment. If you answer Issue Four "Yes" in a particular case, it would be your duty to recommend that the defendant be sentenced to death in that particular case.

Now ladies and gentlemen, I've got just a little bit more instructions, only about a minute or two, but--and I think there will be time for you to deliberate, at least briefly this afternoon. I'm going to take a recess now until 4:30, at which time I will complete the instructions and let you begin your deliberations.

RECESS.

COURT: Members of the jury, you have heard the evidence and the arguments of counsel for the State and for the defendant. I have not summarized all of the evidence, but it is your duty to recall and to consider all the evidence, whether it's been called to your attention or not. If your recollection of the evidence differs from mine, from the prosecutor, the defense attorney, you are to rely solely upon your recollection of the evidence in your consideration. I have not reviewed all the contentions of the State or of the defendant, but it is your duty to consider not only all the evidence, but also to consider all the arguments, contentions and positions urged by the State's attorneys and by the defendant's attorneys in their final speeches to you, and any other contention that arises from the evidence, whether it's called to your attention or not, and to weigh all this in the light of your common sense, and to make your recommendation as to punishment.

The law, as certainly it should, requires the Presiding Judge to be completely and totally impartial. You are not to draw any inference from any ruling that I have made, or any inflection in my voice or expression on my face, or anything else that I have said or done during this trial, that I either have an opinion or have intimated an opinion as to whether any part of the evidence should be

believed or disbelieved, as to whether any of the aggravating or mitigating circumstances has been proved or disproved, or as to what your recommendation in either case ought to be. It is your exclusive providence to find the true facts of these cases and to make your recommendation reflecting the truth as you find it to be.

Now ladies and gentlemen, when you retire you should select a foreperson. You may select the same foreperson that you selected in the guilt phase; however, you are not obliged to do so. Your decision, your answers to any of the issues as to your final recommendation must be unanimous, all twelve of you agree.

Now when you retire, I'm going to ask that you pass up your copies of the issue sheets to the bailiff. When you first retire please do not begin your deliberations, simply select your foreperson. When you receive the issues and recommendation as to punishment forms in the two cases, then you may begin your deliberations. When you have answered the forms consistent with the instructions that I have given you and when you have made a recommendation based upon your answers to the issues, your foreperson has answered either all the issues or such answers that are appropriate based upon my instructions in giving your answers to the issues, your foreperson has filled in, dated and signed the recommendation as to punishment in each case,

then you will have completed your deliberations.

Now again, if you have questions during the deliberative process, the procedure is for all of you to return to the courtroom and your foreperson ask the question on behalf of the jury.

At this time I'm in a position to excuse the two alternate jurors with my very great thanks for your service in this case. At this time the two alternate jurors are excused. This would complete your jury service. I do not believe that the jury clerk is here this afternoon, so it will not be necessary for you to check out with her, but this will complete your jury service and I thank each of you very much. Thank you.

Okay. Ladies and gentlemen, at this time you may retire and when you receive the issue sheet begin your deliberations. Please give your copies of the issue sheets to the bailiff as you retire to the jury room.

JURY RETIRES. (4:26 P.M.)

COURT: At this proceeding outside the presence of the jury, the Court inquires of the State, if the State has any request for additional instructions or any objections to the instructions.

MR. STEPHENS: The State has no request for additional instructions. The State has no objections to the jury instructions.

COURT: The Court inquires of the defendant, if it has requests for additional instructions.

MR. GAMMON: No, Your Honor.

COURT: In light of that, I'm going to give the Recommendations for Punishment Form to the bailiff and ask him to give it to the jury for them to begin their deliberations.

JURY RETURNS. (5:02 P.M.)

COURT: Ladies and gentlemen, having gone over the appointed time yesterday, I think we'll stop on time today. We're going to recess until 9:30 tomorrow morning. During the overnight recess it remains critically important that you not talk to anyone about this case, that you not talk to members of your family about it. It remains critically important that you avoid any media exposure to any aspect. I thank you for your attention throughout the course of the day and particularly thank you for your attention to my instructions to you. At this time take a recess.

RECESS.

Friday, May 11, 1984. (9:30 A.M.)

COURT: Ladies and gentlemen, at this time I would ask that you again retire and continue your deliberations. Thank you very much.

JURY RETIRES.

(5)

SUPREME COURT OF THE UNITED STATES

ROBERT LEE SHELL *v.* MISSISSIPPI

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

No. 89-7279. Decided October 29, 1990

PER CURIAM.

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. To the extent that the Mississippi Supreme Court relied on the "especially heinous, atrocious, or cruel" aggravating factor in affirming petitioner's death sentence, its decision is reversed. See *Maynard* v. *Cartwright*, 486 U. S. 356 (1988). Although the trial court in this case used a limiting instruction to define the "especially heinous, atrocious, or cruel" factor, that instruction is not constitutionally sufficient. See *Godfrey* v. *Georgia*, 446 U. S. 420 (1980); *Cartwright* v. *Maynard*, 822 F. 2d 1477, 1489-1491 (CA10 1987), aff'd, 486 U. S. 356 (1988). The case is remanded to the Mississippi Supreme Court for further consideration in light of *Clemons* v. *Mississippi*, 494 U. S. —— (1990).

It is so ordered.